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THE SUPREME COURT JOURNAL

Edited by

K. SANKARANARAYANAN, B.A., B.L.

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SUPREME COURT JOURNAL OFFICE

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THE SUPREME COURT JOURNAL

I]

JANUARY

[1964

LAW AND COMMONSENSE.

By

SHRI H. S. URSEKAR., M.A. LL.B.,
Presidency Magistrate, Bombay.

“Law is an ass” is a well-known metaphor which represents the ill-conceived ideas of the man in the street as to law. I do not know the author of this adage who in a sublime mood of censure condemned law which is the foundation of stable society. It may be unnecessary to go to the root of its authorship. However, it is necessary to go to the root of this popular misapprehension for two reasons. Firstly, it poses a paradox. Law, at least in a democracy, is the essence of the collective wisdom of the people and hence the question arises as to how wisdom can be equated with stupidity. Secondly, democracy is a Government by laws and not by men. The rule of law is the sustaining power of any democracy. Hence any gross misapprehensions about law merits an examination.

What is law? The Mahabharata says “Law is that which sustains (the society).” But this can hardly be regarded as a definition of law, it is at best its description, as it concerns itself with the purpose of law rather than with its contents. The Austinian definition *viz.*, law as the command of the State refers more to the source and sanction of law. Salmond defines law as the body of principles recognized and applied by the State in the administration of justice. Thus law consists of both the Statute law as well as the Judge-made law. The primary purpose of law in a Police State is to secure peace and order by protecting the ordinary rights of the subjects. A new dimension is added to the purpose of law in a Welfare State in that law is regarded as an instrument to secure social justice and social welfare by safeguarding the fundamental rights of the citizens.

Then why should law which is the foundation of the whole Universe appear to be stupid, lacking in common sense to the layman and even at times to the lawyer. I, for myself would categorize such cases under five heads : (1) Where there appears to be variance between law and justice; (2) Where there appears to be variance between law and morality; (3) Rigidity of law; (4) Some peculiar rules

of law and (5) Some paradoxes in law. Now let us turn to their particular consideration.

In cases where it appears that law and justice are at loggerheads people feel that law is assinine, while justice is forever divine. The popular conception of justice is two-fold, viz., that justice must punish the wrong-doer and protect the weak. In the "*Mrichhkatikam*" one of the duties of the ideal judge as set out in *Act IX v, 5* is that a Judge must protect the weak and punish the knave. Secondly, justice stands for equality. Now actually we come across a case where *A* is murdered by *B* with a knife in broad day light in the market place in the presence of a number of helplessly sympathetic spectators. At the trial we find that *B* is acquitted. The legal grounds for the acquittal may vary. May be *B* is held to be not guilty as the prosecution did not discharge its burden satisfactorily. Now this result in law may arise from that sound presumption of criminal law that every accused is presumed to be not guilty till his guilt is proved by the prosecution on whom the burden lies to show that *B* committed the murder. Most people had read about the murder in the paper already and many had perhaps witnessed it and yet the murderer is let off by Court after a trial. In such cases people think that law is an ass. Besides *B* might have been given the benefit of doubt by the Judge as the evidence led may be exclusively of partisan witnesses whose evidence stands vitiated by malice pre-conceived. But a man in the street is unable to understand that the Court is not to administer justice blindly in the spirit of eye for an eye but it has to administer justice according to law, i.e., justice controlled by the principles of law and the rules of procedure. Further popular feeling of equality is sometimes found to be outraged by the decision of the Court where for example on the same evidence some of the accused are found guilty and others found not guilty. The popular horror is intensified if the latter category includes a man of position. This is because the popular mind is blissfully ignorant of the rules of appreciation of evidence.

The second category of this misconception arises where law appears to be in conflict with the popular idea of morality. Even the *Bhagwad Gita* emphasises that when the women stray away from the path of virtue a chain-reaction of calamities ensues. A common man's sense of morality is shaken when he sees that under the law of the land a man committing adultery is punished while the adulteress can continue her intrigues with impunity. He is puzzled at the provisions that an intercourse by a man with a maiden above the age of sixteen or with a widow is not an offence. His embarrassment knows no bounds when he learns that it is no offence even to commit adultery if the husband of the loose lady consents or connives at the illicit entanglement. Now, in such cases a lay mind thinks that law is foolish. He fails to grasp however that legal justice and moral justice do not go hand in hand and that the culpability of the moral breaches is necessarily conditioned by the will of the legislators.

Rigidity of the law sometimes provokes the censure that law is an ass. Law is at times rigid, inflexible and formal and where the softening influence of equity cannot come into play a rule of law would appear to be foolish. For example, under the *Bombay Shops and Establishments Act, 1948* for breaches of the provi-

sions of the Act, a Court cannot impose a fine of less than Rs. 25. In the case of a petty shopkeeper this minimum quantum of fine may work great hardship and in such a case the rigour of the law being untempered by equity, law appears to be stupidly harsh. But it is well-known that equity follows the law and hence in such cases no relief can be granted to such a person. Now it must be remembered that the Shops and Establishments Act is a social welfare statute meant for giving relief to the shop assistants. Similarly under section 5 of the Suppression of Immoral Traffic in Women and Girls Act, 1956, the Court is bound to impose in case of conviction a minimum sentence of one year on the offender who procures a girl for the purpose of prostitution. Here also the rigidity of law proceeds from the anxiety of the law-makers to safeguard helpless women from traffickers in flesh in order to stamp out social vice. The non-compliance with the provisions as to the giving of the statutory notice as under section 80 of the Civil Procedure Code leads to the disastrous result of the dismissal of the suit of a subject against the State. Such rigidity of law leads the common man to look upon law as an ass, as he is unable to appreciate the reasons behind the rule.

The fourth category consists of cases where the law itself appears to be stupid and unjust as where it has to prescribe an artificial time limit for the enforcement of rights, *e.g.*, a common man cannot understand the three year time limit for filing a suit on a pro-note. Why should his right to recover the loan be barred if he is late by a day or so in instituting a suit. He cannot reconcile himself to the legal consideration that his right to recover the loan remained but his remedy is barred. It is like "Mother safe, child lost" type of consolation. Take a case of a charge of kidnapping a girl out of legal guardianship. If the girl is removed today—the accused is found to be guilty, while if she is removed the next day, from her parents' house after she has completed the 16th year the kidnapper commits no offence. To a man of commonsense this seems to be a case of gross want of commonsense. Further under the Penal Code a child below the age of 7 cannot commit an offence but on the completion of the 7th year he is liable to be arraigned. The truth is that law has to draw the dividing line as to the age or the time factor somewhere and wherever the line may be drawn, it will be open to the facile criticism as to what happens overnight.

Lastly, I may point out some peculiar paradoxes which baffle the lay mind. How can one be guilty of stealing one's own watch. But one can be guilty under certain circumstances, *e.g.*, if *A* gives his watch for repairing to the watch-maker *B* and if *A* removes it without *B*'s consent and then turns round and demands the damages from *B* for losing his watch, *A* can be held guilty for committing theft of his own watch. Now a common man fails to understand, firstly, that theft is not an offence against ownership but that it is an offence against possession and secondly, he overlooks that *A* had acted dishonestly. Take another case. Section 464, Indian Penal Code, in *Explanation I* provides that you can be guilty of forging your own signature, section 375, Indian Penal Code, lays down that you can be guilty of ravaging your own wife if she is below the age of fifteen. In Civil Law too a layman considers the provision that a landlord cannot enter his own premises which are let out to a tenant without the latter's permission to be stupid.

The true position appears to be that, most of these misapprehensions spring from ignorance of the spirit behind the law or the reasons for the rule. Coke said "reason was the life of the Law". However, what Justice Holmes said appears to be the truth *viz.*, the life of the law had not been reason but experience.

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NOTES OF RECENT CASES.

[SUPREME COURT.]

*P.B. Gajendragadkar, K.N. Wanchoo
and K.C. Das Gupta, JJ.
3rd May, 1963.*

*Western India Match Co., Ltd. v.
Their Workmen.
C.As. Nos. 300-301 of 1963.*

Industrial dispute—Production bonus—If to be extended to sales office staff—Meaning.

The management's contention that the Tribunal has erred in thinking that the inspectors, salesmen and retail salesmen are workmen must therefore be rejected.

It is equally trite that just as a man who makes an article, be it bricks or steel, or boxes or some thing else by using different materials in such a way as to make them more suitable to satisfy people's wants is engaged in productive labour, so also is the person or persons who help in the ultimate achievement of satisfaction of those wants by bringing them to the consumer's reach. Therefore, it would be unreasonable to say that though those who make the matches are "producing", but those who sell them are not.

Again, as in most questions which come before the Courts, it is the substance which matters and not the form ; and every fact and circumstance relevant to the ascertainment of the substance deserve careful attention.

On an analysis of the materials on the record we are clearly of opinion that the correct principles have been applied in a fair and reasonable manner and the conclusion reached cannot be challenged before us.

We confirm the Tribunal's decision that the production bonus scheme should be extended to the sales office staff and remand the case to the Tribunal for decision after taking note of all relevant facts whether the production bonus scheme in force in the factory and the factory staff should be extended to the sales office staff with or without modification.

G. B. Pai, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain Advocates of M/s. J. B. Dadachanji & Co., for Appellant (In C.A. No. 300 of 1963) and the Respondent (In C.A.No. 301 of 1963).

C.B. Agarwala, Senior Advocate (C. P. Lal and G. C. Mathur, Advocates, with him), for Respondents (In C.A. No. 300 of 1963) and Appellant (In C.A. No. 301 of 1963).

G.R.

Order accordingly.

[SUPREME COURT.]

B.P. Sinha, C.J., S. K. Das,
Raghubar Dayal, N.Rajagopala Ayyangar
and J.R. Mudholkar, JJ.
7th May, 1963.

Murarka Radhey Shyam Ram Kumar v.
Roop Singh Tathore.
C.As.Nos. 30-31 of 1963.

Representation of People Act (XLIII of 1951), sections 79, 81, 82, 83, 85, 86, 87, 88, 89, 90, 100 and 117—As amended by Act XI of 1961—Verification of pleadings in the manner laid down in the Code of Civil Procedure (V of 1908).

Therefore we do not think that the decision in *Jagan Nath v. Jaswant Singh*, (1954) S.C.J. 257 : (1954) 1 M.L.J. 480 : (1954) S.C.R. 892, is determinative of the problem before us. We need not however pursue this question any further, because we have held that in the present cases there was no contravention of the provisions of section 82 of the Representation of the People Act.

It seems clear to us that reading the relevant sections in Part VI of the Act, it is impossible to accept the contention that a defect in verification which is to be made in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings as required by clause (c) of sub-section (1) of section 83 is fatal to the maintainability of the petition.

We are of the view that the word "copy" in sub-section (3) of section 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it (*See Stroud's Judicial Dictionary* third edition, volume 4, page 3098). In this view of the matter it is unnecessary to go into the further question whether any part of sub-section (3) of section 81 is merely directory. Several English decisions were cited at the Bar.

We agree with the view expressed by the Election Tribunal and we do not think that the defect in the verification due to inexperience of the Oaths Commissioner is such a fatal defect as to require the dismissal of the election petition.

M.C. Setalvad and G.S. Pathak, Senior Advocates, (N.P. Nathwani, H.J. Thacker and G.C. Mathur, Advocates, with them), for Appellant (In C.A.No. 30 of 1963).

G.S. Pathak, Senior Advocate, (N.P. Nathwani, H.J. Thacker and G.C. Mathur, Advocates, with him), for Appellant (In C.A. No. 31 of 1963).

S.G. Agarwala, R.K. Garg, D.P. Singh and M.K. Ramamurthi, Advocates of M/s. Ramamurthi & Co., for Respondent No. 2 (In C.A.No. 30 of 1963).

R.K. Garg, Advocate of M/s. Ramamurthi & Co., for Respondent No. 2 (In C.A.No. 31 of 1963).

V.K. Krishna Menon, Senior Advocate, (Janardan Sharma, Advocate, with him), for Intervener.

G.R.

Appeals dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K.N. Wanchoo
and K.C. Das Gupta, JJ.
7th May, 1963.

Ananda Bazar Patrika (P.) Ltd. v.
Their Employees.
C.A. No. 633 of 1962.

Industrial Dispute—Plea of mala fide in discharging an employee.

The position, thus, is that the conclusion of the Labour Court that the enquiry was not fair and that the appellant has acted *mala fide* in discharging Mr. Sarkar cannot be sustained. We have repeatedly pointed out that though industrial adjudication can and must protect industrial employees from victimisation, a finding as to *mala fide* or victimisation should be drawn only where evidence has been let to justify it; such a finding should not be made either in a casual manner or light-heartedly. In our opinion, no material was produced before the Labour Court in the present proceedings to justify its finding either that the enquiry was unfair, or that the conduct of the appellant in discharging Mr. Sarkar was *mala fide*.

A.V. Viswanatha Sastri, Senior Advocate (*K. Baldev Metha* Advocate, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*M. K. Ramamurthi*, *R. K. Garg*, *S. C. Agarwala* and *D.P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT.]

K. Subba Rao, *Raghubar Dayal* and
J.R. Mudholkar, JJ.
7th May, 1963.

Union of India v.
Sri Ladulal Jain.
C.A.No. 717 of 1962.

Railways Act (IX of 1890), section 77—Sections 20 and 80, *Civil Procedure Code (V of 1908)*—Articles 19 and 298 of the Constitution—Meanings of ‘Public Service’ and ‘Profit element.’

Distinguishing the case of *Satya Narain v. District Engineer, P.W.D.*, A.I.R. 1962 S.C. 1161, the Court held “this case simply held that commercial activity carried on with profit motive cannot be held to be ‘public service’. It does not hold that such activity carried on by Government will not be ‘business’ if conducted without profit motive.

We are of opinion that ‘profit element’ is not a necessary ingredient of carrying on business, though usually business is carried on for profit. It is to be presumed that the Railways are run on a profit, though it may be that occasionally they are run at a loss.

The case reported as *Director of Rationing and Distribution v. The Corporation of Calcutta and others*, (1961) 1 S.C.J. 406 : (1961) 1 M.L.J. (S.C.) 88 : (1961) 1 An. W.R. (S.C.) 88 : (1961) M.L.J. (Crl.) 225 : (1961) 1 S.C.R. 158, relied on, for the appellants is really of no help to them.

In view of what we have said above, we hold that the Union of India carries on the business of running railways and can be sued in the Court of the Subordinate Judge of Gauhati within whose territorial Jurisdiction the head-quarters of one of the railways run by the Union is situated. We accordingly dismiss the appeal with costs.

D.R. Prem, Senior Advocate (*P.D. Menon*, Advocate for *R.N. Sachthey*, Advocate, with him), for Appellants.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K.N. Wanchoo*
and *K.C. Das Gupta*, JJ.
7th May, 1963.

Sur Enamel and Stamping
Works, Ltd. v. The Workmen.
C.A.No. 681 of 1962.

Industrial Disputes Act (XIV of 1947), sections 15-F, 25-F and 25-B—“Continuous Service” as defined in section 2 (eee).

On the plain terms of the section only a workman who has been in continuous service for not less than one year under an employer is entitled to its benefit “Continuous service” is defined in section 2 (eee) as meaning uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal or a lock-out or a cessation of work which is not due to any fault on the part of the workman. What is meant by “one year of continuous service” has been defined in section 25-B. Under this section a workman who during a period of twelve calendar months has actually worked in an industry for not less than 240 days shall be deemed to have completed one year of completed service in the industry.

Where, as in the present case, the workmen have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements

of section 25-B would not be satisfied by the mere fact of the number of working days being not less than 240 days.

The appeal is therefore dismissed in respect of Manik Chandra Das, but allowed in respect of Nagen Bora and Monoharan.

P.K. Sen Gupta and *D.N. Mukherjee*, Advocates, for Appellant.
Janardan Sharma, Advocate, for Respondents.

G.R.

Appeal allowed partly.

[SUPREME COURT.]

S.K. Das, K. Subba Rao, Raghubar Dayal,
N. Rajagopala Ayyangar and
J.R. Mudholkar, JJ.
8th May, 1963.

Valjibhal Muljibhai Soneji v.
The State of Bombay.
C. As. Nos. 122 and 123 of 1963.

Land Acquisition Act (I of 18 4), sections 4, 5, and 6—Road Transport Corpora-
tion Act, (1948)—Bombay State Road Transport Act LXIV of 1950—Meaning of
'Local Authority'—General Clauses Act, 1897.

In our view the acquisition impugned in this case having been made for the benefit of a Corporation, though for a public purpose, is bad because no part of the compensation is to come out of public revenues and the provisions of Part VII of the Land Acquisition Act have not been complied with. We, therefore, allow the appeals and decree the suits of the appellants with costs in all the Courts.

J.C. Bhatt, Advocate and *V.J. Merchant*, Advocate of *M/s. Gagrut & Co.*, for Appellants, (In both appeals).

C.K. Daphtary, Attorney-General for India and *N.S. Bindra*, Senior Advocate, (*R.H. Dhebar*, Advocate with them), for Respondents Nos. 1 and 3. (In both the appeals).

G.R.

Appeals allowed.

[SUPREME COURT.]

K. Subba Rao, Raghubar Dayal and
J.R. Mudholkar, JJ.
8th May, 1963.

Nagraj v.
The State of Mysore.
Cr. A. No. 172 of 1962.

Criminal Procedure Code (V of 1898), sections 132 and 197—Sanction of Government—
Mysore Police Act, 1908.

It follows that the Inspector-General of Police can dismiss a Sub-Inspector who is a police officer below the grade of Assistant Superintendent. No sanction, therefore, of the State Government for the prosecution of the appellant was necessary even if he had committed the offence alleged while acting or purporting to act in the discharge of his official duty.

It is well settled that the jurisdiction of the Court to proceed with the complaint emanates from the allegations made in the complaint and not from what is alleged by the accused or what is finally established in the case as a result of the evidence recorded.

It follows, therefore, that the contention that a police officer cannot be prosecuted without the sanction from the State Government for an offence which he alleges to have taken place during the course of his performing the duties under Chapter IX of the Code cannot be accepted. His mere allegation will not suffice for the purpose and will not force the Court to throw away the complaint of which it had properly taken cognizance on the basis of the allegations in the complaint.

The High Court has said that when the Sessions Judge be satisfied that the facts proved bring the case within the mischief of section 132 of the Code then he is at liberty to reject the complaint holding that it is barred by that section. We consider this to be the right order to be passed in those circumstances. It is not essential that the Court must pass a formal order discharging or acquitting the

accused. In fact no such order can be passed. If section 132 applies, the complaint could not have been instituted without the sanction of the Government and the proceedings on a complaint so instituted would be void, the Court having no jurisdiction to take those proceedings. When the proceedings be void, the Court is not competent to pass any order except an order that the proceedings be dropped and the complaint is rejected.

R. Gopalakrishnan, Advocate, for Appellant.

B.R.L. Iyengar and *P.D. Menon*, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K.N. Wanchoo*
and *K.C. Das Gupta*, JJ.
8th May, 1963.

The Associated Cement
Companies, Ltd. v. The Workmen
C.A. No. 636 of 1962

Industrial Disputes Act (XIV of 1947)—Dismissal—Domestic enquiry.

As we have repeatedly emphasised, domestic enquiries must be conducted honestly and *bona fide* with a view to determine whether the charge framed against a particular employee is proved or not and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself.

That is why we think it is desirable that the conduct of domestic enquiries should be left to such officers of the employer who are not likely to import their personal knowledge into the proceedings which they are holding as enquiry officers.

The result is, the award is set aside in respect of the three workmen, Mehnga Ram, Janak Raj and Daulat Singh in terms of compromise arrived at between the parties before the Court, and the award made in respect of Malak Ram and Vishwa Nath is confirmed. There would be no order as to costs.

R.J. Kolah, Advocate and *J.B. Dadachanji*, *O.C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, for Appellant.

K.T. Sule, *Anand*, *Swaroop* and *Janardan Sharma*, Advocates, for Respondent No. 1.

G.R.

Order accordingly.

[SUPREME COURT.]

P.B. Gajendragadkar, *K.N. Wanchoo*
and *K.C. Das Gupta*, JJ.
9th May, 1963.

J.K. Cotton, Spinning & Weaving
Mills Co., Ltd. v. *Badri Mali*.
G. As. Nos. 480 & 481 of 1962.

U.P. Industrial Disputes Act (XXVIII of 1947)—Industrial Disputes Act (XIV of 1947)—Definition of Workmen.

We are not prepared to hold that the relation of the work carried on by the Malis in the present case can be characterised as remote, indirect or far-fetched. That is why we think that the Labour Appellate Tribunal was right in coming to the conclusion that Malis are workmen under the Act.

In dealing with industrial dispute we are reluctant to interfere with the well established and consistent course of decisions pronounced by the Labour Appellate Court unless, of course, it is shown that the said decisions are plainly erroneous.

We must accordingly hold that the Labour Appellate Tribunal was in error in accepting the very narrow construction of the expression "industrial employees" used in the Government Order.

G.S. Pathak, Senior Advocate (*G.C. Mathur*, Advocate with him), for Appellant (In both the Appeals).

K.S. Hajela, Senior Advocate (*C.P. Lal*, Advocate with him), for Respondent No. 2 (In C.A. No. 480 of 1962).

J.P. Goyal, Advocate, for Respondents Nos. 3 to 12 (In C.A. No. 480 of 1962) and the Respondents (In C.A. No. 481 of 1962).

G.R.

Appeals dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K.N. Wanchoo*
and *K.C. Das Gupta*, JJ.
9th May, 1963.

The State of A.P. v.
N. Venugopal.
Cr. A. No. 142 of 1961.

Penal Code (XIV of 1860), sections 348, 341 and 201 read with section 109, 343, 302 read with 34—*Madras District Police Act*, 1859, section 53.

In our opinion, the High Court is clearly wrong in thinking that the prosecution was barred by section 53 of the Police Act, that section provides in the first place for a period of limitation for certain actions and prosecutions and makes certain other provisions in respect of civil actions with which we are not concerned.

In our opinion, it cannot possibly be said that the acts complained of in the present case were done or intended to be done under any provision of the Police Act or the Code of Criminal Procedure or any other law conferring powers on the police. Section 53 of the Police Act had therefore no application to this case.

There can be no doubt that quite apart from the fact that the Government may and often should issue instructions to its officers, including police officers, such instructions have not however the authority of law. We are not satisfied therefore that the Standing Order No. 145 had the force of law.

We are further of opinion that in any case, the requirement of this order was merely directory and not mandatory. Non-compliance with the provisions of this order therefore does not make the investigation of the case illegal.

We have therefore no hesitation in rejecting the contention raised on behalf of the respondent that the trial was bad in law because investigation was completed by an Inspector of Police. *Munnalal's case*, Criminal Appeals Nos. 102 to 104 of 1961 decided on 17th April, 1963, followed.

Accordingly, we convict the respondents under section 330 of the Indian Penal Code and we sentence each of them to five years' rigorous imprisonment.

The appeal is thus allowed in part and is dismissed as regards the acquittal of the respondents on other charges. The accused to surrender to their bail.

A.S.R. Chari, Senior Advocate (*K.R. Chaudhuri* and *P.D. Menon*, Advocate with him), for Appellant.

N.N. Keswani, Advocate (*amicus curiae*), for Respondents.

G.R.

Appeal allowed in part.

[SUPREME COURT.]

K. Subba Rao, *Raghubar Dayal* and
J.R. Mudholkar, JJ.
9th May, 1963.

Sri Athmanathaswami Devasthanam v.
K. Gopalaswami Ayyangar.
C.A. No. 70 of 1961.

Madras Estates Land Act (I of 1908), section 315)—*Ryot—Who is.*

We are therefore of the opinion that the Courts below have rightly held the land in suit to be cultivable land.

There is ample material on the record to show that the respondent was liable to pay rent for the land given to him for cultivation. Exhibit A-3 is the order of the Pandarasannidhi for granting patta to the respondent of the land belonging to Avadiyarkoil Temple. The very first term mentioned in this order is that the applicant, i.e., the respondent, must pay cash rent at such rates as may be determined by the Pandarasannidhi.

We therefore do not see any force in the contention that the respondent is not a ryot as defined in the Act.

The last point urged is that when the Civil Court had not jurisdiction over the suit, the High Court could not have dealt with the cross-objection filed by the appellant with respect to the adjustment of certain amount paid by the respondent. This contention is correct. When the Court had no jurisdiction over the subject-matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint.

We therefore dismiss the appeal except in so far as it relates to the order of the High Court on the cross-objection filed by the appellant. We set aside the order dismissing the cross-objection. We order the appellants to pay the costs of the respondent throughout.

K. N. Rajagopal Sastri, Senior Advocate, (*M.S.K. Sastri* and *M. S. Narasimhan*, Advocates with him), for Appellant.

A.V. Viswanatha Sastri, Senior Advocate (*T.V.R. Tatachari*, Advocate with him), for Respondent.

G.R.

Appeal dismissed in the main.

[SUPREME COURT.]

P.B. Gajendragadkar, K.N. Wanchoo
and *K.C. Das Gupta*, JJ.
9th May, 1963.

The Bombay Gas Co., Ltd. v.
Gopal Bhiva.
C. As. Nos. 333-348 of 1962.

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Article 181, Limitation Act (IX of 1908)—Section 48, Civil Procedure Code (V of 1908).

It is well settled that Article 181, Limitation Act, applies only to applications which are made under the Code of Civil Procedure, and so, its extension to applications made under section 33-C (2) of the Industrial Disputes Act would not be justified. As early as 1883, the Bombay High Court had held in *Bai Manekbai v. Manekji Kwasji*, (1883) 7 Bom. 213, that Article 181 only relates to applications under the Code of Civil Procedure in which case no period of limitation has been prescribed for the application, and the consensus of judicial opinion on this point had been noticed by the Privy Council in *Hansraj Gupta v. Official Liquidators, Dehra Dun, Mussoorie Electric Tramway Company, Ltd.*, L.R. 60 I.A. 13 (20) : 64 M.L.J. 403. An attempt was no doubt made in the case of *Sha Mulchand & Co. Ltd. v. Jawahar Mills, Ltd.*, (1953) S.C.J. 68 : (1953) S.C.R. 351 at 371 to suggest that the amendment of Articles 158 and 178 *ipso facto* altered the meaning which had been attached to the words in Article 181 by judicial decisions, but this attempt failed, because this Court held "that the long catena of decisions under Article 181 may well be said to have, as it were, added the words "under the Code" in the first column of that Article." Therefore, it is not possible to accede to the argument that the limitation prescribed by Article 181 can be invoked in dealing with applications under section 33-C (2) of the Industrial Disputes Act.

R.J. Kolah Advocate and *J.B. Dadachanji*, O.C. Mathur and *Ravinder Narain*, Advocates of *J.B. Dadachanji & Co.*, for Appellant.

S.V. Gupte, Additional Solicitor-General of India (*K.T. Sule*, *M.C. Bhandare*, *M. Rajagopalan*, and *K.R. Choudhury*, Advocates with him), for Respondents.

G.R.

Appeals dismissed.

[SUPREME COURT.]

K. Subba Rao, Raghubar Dayal, and
J.R. Mudholkar, JJ.
10th May, 1963.

Nihal Singh v.
The State of Punjab.
Cr.A.No. 53 of 1962.

Constitution of India (1950), Article 136—Penal Code (XLV of 1860)—Sections 148 and 302, 149—Appeal against acquittal.

Article 136 of the Constitution is couched in the widest phraseology. This Court's jurisdiction is limited only by its discretion. It can therefore, in its dis-

cretion entertain an appeal and exercise all the powers of an appellate Court in respect of judgments, decrees, determinations, sentences or orders mentioned therein. It means that this Court has undoubtedly jurisdiction to interfere even with findings of fact arrived at by the High Court in an appeal setting aside those of a Subordinate Court acquitting the accused. But this wide jurisdiction has to be regulated by the practice of this Court. The fact that the appellate Court in setting aside the order of acquittal has not followed the principles laid down by this Court in *Sanwat Singh v. State of Rajasthan*, (1961) 2 S.C.J. 179 : (1961) M.L.J. (Cr.) 472: (1961) 3 S.C.R. 120, 129, may certainly be a ground for this Court interfering with the judgment of the High Court. But if the High Court, having followed the aforesaid principles, has considered the evidence and given findings of fact thereon, we think the same practice obtaining in this Court in regard to findings of fact in appeals under Article 136 of the Constitution may conveniently be adopted.

We have been taken through the judgment of the High Court. We are satisfied that the High Court has borne in mind the principles laid down by this Court in *Sanwat Singh's case* and has considered the entire evidence carefully and arrived at the finding of fact as it did. We do not see any exceptional circumstances to depart from the usual practice and review the evidence over again.

It is, therefore, obvious that all the accused were armed with deadly weapons and that as soon as Tara Singh came they rushed at him and when the deceased came to rescue him they conjointly used those weapons and gave them serious injuries which ended in their immediate death. In the circumstances the object to kill the deceased was writ large on the evidence. There is no force in this argument.

A. Ranganadham Chetty, Senior Advocate (*K.L. Arora*, Advocate, with him), for Appellants.

B.K. Khanna and *P.D. Menon*, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K Subba Rao, *Raghubar Dayal* and
J.R. Mudholkar, JJ.
10th May, 1963.

General Manager, B.E.S.T. Undertaking,
Bombay v. *Mrs. Agnes*.
C.A. No. 133 of 1961.

Workmen's Compensation Act (VIII of 1923), section 3 (1)—Standing Rules of the Bombay Municipalities—B.E.S.T. Undertaking.

By majority.—It is manifest from the aforesaid rules that the timings are of paramount importance in the day's work of bus driver. If he misses his car he will be punished. If he is late by more than one hour he will be marked absent for the day; and if he is absent for 3 days in a month, he will be taken out of the permanent list. Presumably to enable him to keep up punctuality and to discharge his onerous obligations, he is given the facility in his capacity as a driver to travel in any bus belonging to the Undertaking. Therefore, the right to travel in the bus in order to discharge his duties punctually and efficiently is a condition of his service.

Can it be said that the said facility is not one given in the course of employment? It can even be said that it is the duty of the employees in the interest of the service to utilize the said bus both for coming to the depot and going back to their homes. If that be so what difference would it make if the employer, instead of providing a separate bus, throws open his entire fleet of buses for giving the employees the said facility? They are given that facility not as members of the public but as employees; not as a grace but as of right because efficiency of the service demands it. We could, therefore, hold that when a driver when going home from the depot or coming to the depot uses the bus, any accident that happens to him is an accident in the course of his employment.

G.S. Pathak Senior Advocate (*S.N. Andley* and *Rameshwar Nath*, Advocates of *M/s. Rajinder Narain & Co.* with him), for Appellant.

R. Ganapathy Iyer, Advocate (*amicus curiae*), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*K. Subba Rao, Raghubar Dayal and
J. R. Mudholkar, JJ.*
9th May, 1963.

The Union of India v.
Maddala Thathiah.
C.A. No. 53 of 1961.

Contract—Construction of the terms of contract between the parties.

We are therefore of the view that the condition mentioned in the note to para. 2 of the tender or in the letter dated 16th February, 1948, refers to a right in the appellant to cancel the agreement for such supply of jaggery about which no formal order had been placed by the Deputy General Manager with the respondent and does not apply to such supplies of jaggery about which a formal order had been placed specifying definite amount of jaggery to be supplied and the definite date or definite short period for its actual delivery. Once the order is placed for such supply on such dates, that order amounts to a binding contract making it incumbent on the respondent to supply jaggery in accordance with the terms of the order and also making it incumbent on the Deputy General Manager to accept the jaggery delivered in pursuance of that order.

H. N. Sanyal, Additional Solicitor-General of India and K. L. Gosain, Senior Advocate (P. D. Menon, Advocate, with them), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (M. S. K. Sastri, Advocate, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar and
K. N. Wanchoo, JJ.*
13th August, 1963.

The State of Maharashtra v.
Jagatsing Charansing Arora.
Cr.A. No. 183 of 1961.

Road Transport Corporation Act (XLIV of 1950), section 43—Penal Code (XLV of 1860), sections 21 and 161—Meaning of Public Servant.

The High Court therefore was not right in applying the ratio in *The State of Ajmer v. Shrivijal*, (1959) S.C.J. 911 : (1959) M.L.J. (Cri.) 589 : (1959) Supp. 2 S.C.R. 739, to the facts of this case, for it was not necessary on the facts of this case to indicate who was the other public servant with whom service would be rendered. It was enough if it was shown that money was paid to a public servant in a particular department by which an order would be made and if it was taken for doing any official act in that department. The reason therefore that has been given by the High Court in acquitting Jagatsing and in consequence Sheikh Ahmed cannot be upheld.

As taking of bribe cannot under any circumstances be shown to amount to acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law, the person taking a bribe cannot be said to be a public servant within the meaning of section 21 of the Indian Penal Code in view of the clear words of section 43 of the Road Transport Corporation Act. The difficulty has however now been obviated by the amendment of section 21 by the addition of the twelfth clause therein. But as section 81 stood at the relevant time we have to take recourse to section 43 of the Transport Act and the words of that section make it quite clear that members, officers and servants of corporation can only be public servants when they act or purport to act in pursuance of any of the provisions of the Transport Act or of any other law; and taking of a bribe can never amount to acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law. In these circumstances the trial Court was right in acquitting Jagatsing on the ground that he was not a public servant. It follows therefrom that Sheikh Ahmed must also be acquitted.

H. R. Khanna and R. H. Dhebar, Advocates, for Appellant.

T. V. R. Talachari, Advocate (amicus curiae), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*S. K. Das, Acting C.J., K. Subba Rao,
Raghubar Dayal, N. Rajagopala Ayyangar and
J. R. Mudholkar, JJ.*
14th August, 1963.

*Guru Gobinda Basu v.
Sankari Prasad Ghosal.*
C.A. No. 486 of 1963.

Representation of People Act (XLIII of 1951) and Article 102 (1) (a) of the Constitution of India.

The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor—not decisive of the question. As we have said earlier, whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered.

Cases distinguished : (1958) S.C.J. 329 : (1958) 1 M.L.J. (S.C.) 88 : (1958) 1 An. W.R. (S.C.) 88 : (1958) S.C.R. 387 and (1959) S.C.J. 167 : (1959) S.C.R. 1167.

S. Chaudhuri, Senior Advocate (R. C. Deb and S.S. Shukla, Advocates; with him), for Appellant.

Hari Prosonna Mukherjee, K.G. Hazra Chaudhuri and D. N. Mukherjee, Advocates, for Respondents Nos. 1 and 2.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo and
K. C. Das Gupta, JJ.*
14th August, 1963.

*M/s. Aluminium Corporation
of India, Ltd. v.
Their Workmen.*
C.A. Nos. 238 and 818 of 1962.

Industrial Dispute—Full Bench formula—Rehabilitation charges—Bonus—Basic wage.

As has been emphasised in more than one case by this Court, the correctness of the figures as shown in the balance-sheet itself are to be established by proper evidence in Court by those responsible for preparing the balance-sheet or other competent witnesses. (1960) S.C.J. 696 : (1960) 2 S.C.R. 906 and (1960) S.C.J. 748 : (1960) 2 S.C.R. 841. This was recently emphasised again in *Bengal Kagazkal Mazdoor Union v. The Titagarh Paper Mills Co., Ltd.*, Civil Appeal Nos. 550 and 551 of 1962 decided on 11th April, 1963.

The Industrial Tribunal is not concerned with what is paid by the Company to its officers. It is concerned only with the workmen's claim of bonus. For deciding therefore what part of the available surplus should be paid to the workmen as bonus the wage bill of the workmen only has to be considered. It is not disputed that the wage bill (basic wage) of the workmen, excluding the officers, was Rs. 50,000. The Tribunal has therefore committed no error in fixing the bonus figures on this basis.

We wish to make it clear that what we have said in this judgment will not stand in the way of the employer substantiating a claim for rehabilitation charge by proper evidence, in any future dispute on that question.

A. V. Viswanatha Sastri, Senior Advocate; (P. B. Maheshwari, Advocate, with him), for Appellant.

Janardhan Sharma, Advocate, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo and
K. C. Das Gupta, JJ.*
14th August, 1963.

*State Bank of Bikaner v.
Balai Chander Sen.*
C.A. No. 516 of 1963

Industrial Disputes Act (XIV of 1947), section 33 (2) (b)—Approval of the proposed action against an employee before the actual action.

All that the *Strawboard Manufacturing Co. v. Govind*, (1962) Supp. 3 S.C.R. 618^c A.I.R. 1962 S.C. 1500, lays down is that the application can be made after the action of which the approval is sought has been taken and that when this happens the three conditions in the Proviso to section 33 (2) (b) must be shown to be parts of the same transaction. But if an employer chooses to make an application under section 33 (2) (b) for approval of the action he proposes to take and then takes the action we find nothing in section 33 (2) (b) which would make such an application not maintainable. Such an application in our opinion would not be contrary to the provisions of section 33 (2) (b) read with the Proviso thereof and would be maintainable. The view of the Labour Court therefore that the application by the appellant in the present case was not maintainable must fail.

We are of opinion that the enquiry held in this case was fair and proper and in accordance with the principles of natural justice and the respondent had full opportunity to defend himself. We are also satisfied that there is no question of victimisation or unfair labour practice. Therefore the approval sought for must be granted.

B. Sen, Senior Advocate (*J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of (*M/s. Dadachanji & Co.*, with him), for Appellant.

Janardan Sharma, Advocate, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

*A. K. Sarkar, M. Hidayatullah and
J. C. Shah, JJ.*
16th August, 1963.

State of U.P. v. Singhara Singh.
Cr. A. No. 31 of 1962.

Criminal Procedure Code (V of 1898), section 164—Sections 74 and 80 of the Evidence Act (I of 1872)—Admissibility of oral evidence of the confession.

A confession duly recorded under section 164, Criminal Procedure Code would no doubt be a public document under section 74 of the Evidence Act which would prove itself under section 80 of that Act.

Now a statement would not have been "duly made" unless the procedure for making it laid down in section 164 had been followed. What section 533, therefore, does is to permit oral evidence to be given to prove that the procedure laid down in section 164 had in fact been followed when the Court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in section 164 is not intended to be obligatory, section 533 really emphasises that that procedure has to be followed.

We, therefore, think that the decision in *Nazir Ahmed v. The King Emperor*, L.R. 63 I.A. 372 : 71 M.L.J. 476, also covers the case in hand and that on the principle there applied, here too oral evidence given by Mr. Dixit of the confession made to him must be held inadmissible. Cases considered : L.R. 63 I.A. 372 : 71 M.L.J. 476 ; I.L.R. (1960) 2 All. 488 ; L.R. (1875) 1 Ch. D. 426, 431, (1954) S.C.J. 362 : (1954) S.C.R. 1098 ; (1963) 1 M.L.J. (S.C.) 1 : (1963) 1 An. W.R. (S.C.) 1 ; (1962) 2 S.C.J. 655 : (1962) M.L.J. (Cr.) 678 ; (1962) 1 S.C.R. 662 : A.I.R. 1963 All. 308 ; L.R. 77 I.A. 65 ; L.R. 73 I.A. 1 : (1946) 1 M.L.J. 147 ; L.R.

76 I.A. 147 : (1949) 2 M.L.J. 194 ; I.L.R. (1939) All. 377 ; A.I.R. 1960 Mad. 443 ; (1956) S.C.J. 182 : (1956) 1 M.L.J. (S.C.) 100 : (1955) 2 S.C.R. 1140.

C. B. Aggarwala, Senior Advocate (G. C. Mathur and C. P. Lal, Advocates, with him), for Appellant.

Nuruddin Ahmed and V. D. Misra, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, Raghubar Dayal and
J.R. Mudholkar, JJ.
19th August, 1963.

Guramma Bhratar Chanbasappa
Deshmukh v. Mallappa Chanbasappa.
C. As. Nos. 334-335 of 1960.

Hindu Law—Adoption—Existence of child in embryo—If invalidates an adoption—Law relating to Shudras—Validity of a gift to daughter.

The doctrine evolved wholly for a secular purpose would be inappropriate to a case of adoption. We should be very reluctant to extend it to adoption, as it would lead to many anomalies and in some events defeat the object of the conferment of the power itself. The scope of the power must be reasonably construed so as to enable the donee of the power to discharge his religious duty. We, therefore, hold that the existence of a son in embryo does not invalidate an adoption.

The Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a normal obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by Courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one.

Applying the aforesaid principles, we have no doubt that in the present case, the gift made by the father was within his right and certainly reasonable.

A. V. Viswanatha Sastri, Senior Advocate (M. Rajagopalan and K. R. Chaudhuri, Advocates, with him), for Appellants Nos. 1 and 3 (In C.A. No. 334 of 1960) and Respondents Nos. 1 and 3 (In C.A. No. 335 of 1960).

R. Gopalakrishnan, Advocate, for Appellants Nos. 4, 5 and 13 (In C.A. No. 334 of 1960) and Respondents Nos. 4, 5 and 13 (In C.A. No. 335 of 1960).

Naunit Lal, Advocate, for Appellants Nos. 6, 9 to 11 and 12 (In C.A. No. 334 of 1960) and Respondents Nos. 6, 9 to 11 and 12 (In C.A. No. 335 of 1960).

N. C. Chatterjee, Senior Advocate (S. Venkatakrishnan and A. G. Ratnaparkhi, Advocates, with him), for Respondents (In C. A. 334 of 1960) and Appellants (In C. A. No. 335 of 1960).

G.R.

Appeals dismissed in the main.

[SUPREME COURT.]

A. K. Sarkar, M. Hidayatullah and
J. C. Shah, JJ.
19th August, 1963.

Noor Khan v.
State of Rajasthan.
Cr. A. No. 9 of 1963.

Criminal Procedure Code (V of 1898), sections 154, 161, 417, 418, 423—Sections 173, 207-A of the Code as amended by Act (XXVI of 1955).

These cases I.L.R. (1945) Nag. 151, I.L.R. (1946) Nag. 126 and I.L.R. (1948) Nag. 110, were decided before the Code of Criminal Procedure was amended by Act XXVI of 1955, but on the question raised by counsel there is no material difference made by the amended provision. After the amendment of the Code in 1955, it is the duty of the investigating officer in every case where investigation has been held under Chapter XIV to supply to the accused copies of the statements of witnesses proposed to be examined at the trial. Under the Code before it was amended, it was for the Court when a request was made in that behalf to supply to the accused statements of each witness when he was called for examination. The effect of the breach of the provisions of section 207-A and section 173, Code of Criminal Procedure was considered by this Court in *Narayan Rao v. State of Andhra Pradesh*, (1957) S.C.J. 727 : (1957) 2 M.L.J. (S.C.) 139 : (1957) 2 An. W.R. (S.C.) 139 : (1957) M.L.J. (Cr.) 690 : A.I.R. 1957 S.C. 737, and it was held that failure to comply with the provisions of section 173 (4) and section 207-A (3) is merely an irregularity which does not affect the validity of the trial. It was observed, in dealing with the question whether an omission to comply with the provisions of section 173 (4) read with sub-section (3) of section 207-A necessarily renders the entire proceeding and the trial null and void :—

“We may repeat that the provisions of section 162, Code of Criminal Procedure provide a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances. The provisions relating to the record of the statements of the witnesses and the supply of copies to the accused so that they may be utilised at the trial for effectively defending himself cannot normally be permitted to be whittled down, and where the circumstances are such that the Court may reasonably infer that prejudice has resulted to the accused from the failure to supply the statements recorded under section 161 the Court would be justified in directing that the conviction be set aside and in a proper case to direct that the defect be rectified in such manner as the circumstances may warrant. It is only where the Court is satisfied, having regard to the manner in which the case has been conducted and the attitude adopted by the accused in relation to the defect, that no prejudice has resulted to the accused that the Court would, notwithstanding the breach of the statutory provisions, be justified in maintaining the conviction. This, in our judgment, is one of those cases in which such a course is warranted.” L.R. 74 I.A. 65 : I.L.R. (1948) Mad 1 : (1947) 1 M.L.J. 219, relied upon.

Purshottam Trikamdas, Senior Advocate (C. L. Sareen and R.L. Kohli, Advocates, with him), for Appellant.

S. K. Kapur and R.N. Sachthey, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, N. Rajagopala Ayyangar and
J. R. Mudholkar, JJ.
22nd August, 1963.

State of Mysore v.
K. Manche Gowda.
C.A. No. 387 of 1963.

Constitution of India (1950), Article 311—Reasonable opportunity—Test.

Under Article 311 (2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges levelled against him, but also to establish that the punish-

ment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action; see the decision of this Court in the *State of Assam v. Bimal Kumar Pandit*, A.I.R. 1963 S.C. 1612.

The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of "reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation.

This order will not preclude the Government from holding the second stage of the enquiry afresh and in accordance with law.

C. K. Daphtary, Attorney-General for India (*R. Gopalakrishnan*, Advocate and *B. R. G. K. Achar*, Advocate, for *P. D. Menon*, Advocate, with him), for Appellant.
Naunit Lal, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*A. K. Sarkar, M. Hidayatullah and
J. C. Shah, JJ.*
23rd August, 1963.

*Valia Peedikakkandi Kathcessa Umma v.
Pathakkalan Narayanath Kunhamu.*
C.A. No. 513 of 1961.

Muhammadan Law—Gift by a husband to his minor wife and accepted on her behalf by her mother—Validity.

In our judgment the gift in the present case was a valid gift. Mammotty was living at the time of the gift in the house of his mother-in-law and was probably a very sick person though not in *marzulmaut*. His minor wife who had attained discretion was capable under Muhammadan law to accept the gift, was living at her mother's house and in her care where the husband was also residing. The intention to make the gift was clear and manifest because it was made by a deed which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife, the gift would have been complete under Muhammadan law and it seems impossible to hold that by handing over the deed to his mother-in-law, in whose charge his wife was during his illness and afterwards Mammotty did not complete the gift. In our opinion both on texts and authorities such a gift must be accepted as valid and complete.

S. T. Desai, Senior Advocate (*V. A. Seyid Muhammad*, Advocate, with him), for Appellants.

Sardar Bahadur, Advocate for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, N. Rajagopala Ayyangar and
J. R. Mudholkar, JJ.*
26th August, 1963.

*University of Mysore v.
C. D. Govinda Rao.*
C.As. Nos. 417-418 of 1963.

Writ of Quo Warranto, Mandamus—Mysore University Act (XXIII of 1956).

Broadly stated, the *quo warranto* proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or

liberty is called upon to show by what right he holds the said office, franchise or liberty ; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of *quo warranto* ousts him from that office. In other words, the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions ; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office ; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the Courts to issue writ of *quo warranto* is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of *quo warranto*, he must satisfy the Court, *inter alia*, that the office, in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.

We have carefully considered the affidavits filed by both the parties in the present proceedings and we have no hesitation in holding that at no stage it appears to have been urged by the respondent before the High Court that the infirmity in the appointment of appellant No. 2 proceeded from the fact that the statutory rules and ordinances made by appellant No. 1 had been contravened.

In our opinion, in coming to the conclusion that appellant No. 2 did not satisfy the first qualification, the High Court is plainly in error.

Therefore there is no doubt that the High Court was in error in coming to the conclusion that since appellant No. 2 could not be said to have secured a high Second Class Master's Degree of an Indian University, he did not satisfy the first qualification. It is plain that Master's Degree of the Durham University, which appellant No. 2 has obtained, can be and must have been taken by the Board to be equivalent to a high Second Class Master's Degree of an Indian University, and that means the first qualification is satisfied by appellant No. 2. That being so, we must hold that the High Court was in error in issuing a writ of *quo warranto*, quashing the appointment of appellant No. 2.

G. K. Daphtary, Attorney-General, for India and G. R. Ethirajulu Naidu, Senior Advocate (S. N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with them), for Appellant (In C.A. No. 417 of 1963).

V. K. Govindarajulu and R. Gopalakrishnan, Advocates, for Appellant (In C.A. No. 418 of 1963).

S. K. Venkataranga Iyengar, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Respondent No. 1 (In both the appeals).

G.R.

Appeals allowed.

[SUPREME COURT.]

S. K. Das, Acting C.J.,
M. Hidayatullah and K. C. Das Gupta, JJ.
28th August, 1963.

Sajjan Singh v. State of Punjab.
Cr. A. No. 98 of 1960.

Prevention of Corruption Act, section 5 (1), (2), (3)—Section 161/165, Indian Penal Code.

A statute cannot be said to be retrospective "because a part of the requisites for its actions is drawn from a time antecedent to its passing" (Maxwell on Interpretation of Statutes, 11th Edition, P. 211; see also *State of Bombay v. Vishnu Ramachandra*, (1961) 1 S.C.J. 267 : (1961) M.L.J. (Cr.) 150 : A.I.R. (1961) S.C. 307).

We see no warrant for the proposition that where the law provides that in certain circumstances a presumption shall be made against the accused the prosecution is barred from adducing evidence in support of its case if it wants to rely on the presumption.

We have therefore come to the conclusion that the facts proved in this case raise a presumption under section 5 (3) of the Prevention of Corruption Act and the appellant's conviction of the offence with which he was charged must be maintained on the basis of that presumption. In this view of the matter we do not propose to consider whether the High Court was right in basing its conclusion also on the other evidence adduced in the case to prove the actual payment of illegal gratification by the partners of the firm M/s. Ramdas Chhankanda Ram.

I. M. Lall and B. N. Kirpal, Advocates, for Appellant.

P. K. Khanna and R. N. Sachthey, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*S. K. Das, Acting C.J., A. K. Sarkar and
M. Hidayatullah, JJ.*

29th August, 1963.

*Karam Singh Sobti v.
Sri Pratap Chand.
C.A. No. 392 of 1963.*

Delhi Rent Control Act, 1958, section 57—Repealed Act of 1952—Sub-letting by a tenant and acquiescence by the landlord.

*By majority :—*We also agree with the High Court that if the First Proviso to sub-section (2) of section 57 is interpreted in the way contended for by the appellant here, it would really be giving effect to the provisions of the Control Act of 1958 retrospectively, though sub-section (2) of section 57 states in clear terms that all suits and proceedings pending at the commencement of the new Act will be dealt with in accordance with the provisions of the old Act. This is really putting the same argument that the proviso must be read harmoniously with the substantive provision, in another way.

For the reasons given above we have come to the conclusion that in the present case the respondent-landlord is entitled to the benefit of clause (c), sub-clause (i), of the Proviso to section 13 (1) of the Control Act of 1952 and the First Proviso to sub-section (2) of section 57 of the Control Act of 1958 does not stand in his way. He is, therefore, entitled to succeed, as the appellant has failed to make out any acquiescence by the landlord to the sub-letting in question. Therefore, the High Court rightly allowed the petition in Revision and restored the decree for possession made by the trial Court. The appeal fails and is dismissed with costs.

Bishan Narain, Senior Advocate (O. C. Mathur, Ravinder Narain and J. B. Dadachanji, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (K. K. Jain, Advocate, with him), for Respondent No. 1.

S. N. Andley, Advocate of M/s. Rajinder Narain & Co., for Respondent No. 2.

G.R.

Appeal dismissed.

The Supreme Court Journal

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JANUARY

[1964

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J.R. MUDHOLKAR, JJ.

The State of Madhya Pradesh and others

.. Appellants*

v.

Balkishan Nathani and others

.. Respondents.

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), section 40—Order of Deputy Commissioner fixing rent recognising proprietors right as occupancy tenant—If open to review.

Central Provinces Land Revenue Act (II of 1917), section 47 (1)—Scope of power under.

There is no provision in the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act which authorises the Deputy Commissioner to review an order made by him under section 40 (3) of the Act and there fore an order made by him subject to appeal under section 84 becomes final. The Nistar Officer has therefore no right to initiate proceedings for reopening and review of that order. Neither section 13 nor section 15 (3) of the Act has any relevance in the context of an order made by the Deputy Commissioner under section 40 of the Act.

Section 47 (1) of the Central Provinces Land Revenue Act contemplates entering only such changes in the annual papers as take place during the course of the agricultural year. That section therefore, does not cover a case of correction of the entries on the ground of mistake. The Nistar Officer has no jurisdiction to correct the entries.

Appeals by Special Leave from the Judgment and Order dated the 8th March, 1956, of the former Nagpur High Court in Miscellaneous Writ Petitions Nos. 22 and 274 of 1955.

B. Sen, Senior Advocate (I.N. Shroff, Advocate, with him), for Appellants;

G.B. Pai, Advocate and J.B. Dadachanji, Ravinder Narain and O.C. Mathur, Advocates of M/s. J.B. Dadachanji & Co., for Respondents Nos. 2 to 6.

The Judgment of the Court was delivered by

Subba Rao, J.—These two appeals by Special Leave are filed against the common Judgment of a Full Bench of the High Court of Judicature at Nagpur in Writ Petitions Nos. 22 of 1955 and 274 of 1955 filed by respondents 1, 3 to 6 herein in the said Court.

The facts in Appeal No. 370 of 1960 may be stated first. Respondent 1, Seth Balkishan Nathani, was the proprietor and lambardar of Mouza Sonpairi in Tehsil and District Raipur. On 14th January, 1947, he executed perpetual pattas in favour of his wife, Vashodabai, since deceased, and respondents 4, 5 and 6 in respect of *khudkasht* and grass lands of Mouza Sonpairi. In *Tabdili Jamabandi* of the year 1946-47 the said lands were recorded as the Occupancy Tenancy Holdings of the said respondents 4 to 6 and respondent 2, Govindlal Nathani, the legal repre-

*C.A. Nos. 370 and 371 of 1960.

sentative of Vashodabai. The same entry was found in the Jamabandis of the subsequent years. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (1 of 1951), hereinafter called the Act, came into force on 22nd January, 1951. Thereafter in due course the estate of the said proprietor was duly notified under section 3 of the Act. On 25th March, 1952, the Deputy Commissioner, Land Reforms, acting under section 40 of the Act, recognises the said Balkishan Nathani as the pattadar and settled the assessment payable by him in respect of Khasra Nos. 289/2 and 366/7 of Mouza Sonpairi. No appeal was preferred against that order. Thereafter, appellant 2, the Nistar Officer *cum* Additional Deputy Commissioner, Raipur, started proceedings against the respondents for the correction of old annual papers in Mouza Sonpairi, with a view to reopen the earlier order made under section 40 of the Act, as the earlier order was passed on the basis of the entries found in Tabdili Jamabandi of the year 1946-47 and subsequent years. Respondent 1, Seth Balkishan Nathani, raised an objection that appellant 2 had no jurisdiction to initiate the proceedings. Appellant 2 overruled the objection and made the following order :

"On the next hearing, 5 witnesses may be produced for proving cultivation. The names of the purchasers, to whom the lands have been sold, be obtained from the *Patwari* and a notice be served on them that they should file their statements as well as should bring the sale-deeds along with them. Hearing fixed for date 4th August, 1954. The non-applicants may file other evidence, which they wish to file."

It will be seen from the said order that the second appellant purported to make an inquiry in regard to the factum of cultivation as well as the validity of the sale-deeds whereunder respondent 1 created interests in the other respondents. Respondent 1 preferred an appeal from that order to the Board of Revenue, Madhya Pradesh, but the same was dismissed on the ground that it was premature. Thereupon, the respondents filed the Writ Petition No. 22 of 1955 in the High Court of Madhya Pradesh.

Civil Appeal No. 371 of 1960 relates to patta No. 1 of Mouza Kachna in Tehsil and District Raipur. Respondent 1 was the Proprietor and Lambardar of the said Mouza. On 19th February, 1948, the said Seth Balkishan Nathani executed perpetual pattas in respect of the said lands in favour of the same respondents as in the other appeal. In the annual papers the said lands were recorded as the Occupancy Tenancy Holdings of respondents 2 to 6. On 8th December, 1954, appellant 2 made an inspection of the said lands and made the following order on 9th December, 1954 :

** * * * *

2. There were found to be obvious mistakes in Government documents *Khasra, Jamabandi and Tabdilat*. Mistakes discharged (discovered) by me in *Patwari* papers have been corrected.

3. Ex-proprietors (1) Balkishan Nathani and others and (2) Narayanarao made absolutely bogus transfers in favour of their family members, namely,

(i) (a) Kamlabai, (b) Pana Bai, (c) Yashodabai, (d) Chhote Bai of Nathani family.

(ii) Kamla Bai Chitnavis, wife of Narayanarao, ex-proprietor.

Patwari entered names with out cultivation and agricultural possession against Land Record Manual, Volume 1.

4. Mistakes found in *patwari* records have been corrected by me after spot inspection.

These papers be now filed."

It will be seen from the said order that the second appellant found that the transfers made by respondent 1 in favour of the other respondents were bogus and that he also corrected the entries in the annual papers to the effect that the landlord was not cultivating the lands as recorded in the earlier papers. The respondents filed Writ Petition No. 274 of 1955 in the High Court to quash the said order. A Full Bench of the High Court held that neither section 15 (3) of the Act nor section 47 (1) of the Central Provinces Land Revenue Act, 1917 (C. P. Act II of 1917), hereinafter called the Land Revenue Act, conferred a power on the Nistar Officer to review orders already made in respect of the factum of cultivation or the occupancy rights recognized under the relevant provisions of the said Acts. In the result, it allowed the two writ petitions quashing the proceedings started by the

Nistar Officer in the case of Mouza Sonpairi and the order dated 9th December, 1954, passed by him in the case of Mouza Kachna and prohibiting him from taking further proceedings which may affect the occupancy tenancy rights of the petitioners in the lands in dispute. Hence the two appeals.

Mr. Sen, learned counsel for the appellants, raised before us the following two points : (1) under section 47 (1) of the Land Revenue Act, the Nistar Officer has jurisdiction to correct entries made for earlier years in a subsequent year on the ground of mistake ; and (2) the said officer has also jurisdiction to review under section 15 (3) of the Act the order made by him under section 40 thereof.

Mr. Pai, learned counsel for the respondents, argued at the outset that the appeals have abated for two reasons, namely, (1) the second petitioner died after the arguments were heard by the High Court and before the judgment was delivered and the petition filed by the appellants to set aside abatement was dismissed, and (2) the second respondent in the appeals died on 7th March, 1956 and the application filed on 28th June, 1957 to set aside the abatement and to bring his legal representatives on record was out of time. On the merits, he sought to sustain the judgment of the High Court for the reasons mentioned therein.

As we are inclined to agree with the view expressed by the High Court on the two questions raised by the learned counsel for the appellants, we do not propose to consider the preliminary objection raised by the learned counsel for the respondents.

The two questions raised in this case are in a way inter-related and the answer to them depends upon the construction of the relevant sections of the Act and the Land Revenue Act. It would be convenient to read the relevant provisions.

THE MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, 1950 (I OF 1951).

Section 3. (2)—After the issue of a notification under sub-section (1), no right shall be acquired in or over land to which the said notification relates, except by succession or under a grant or contract in writing made or entered into by or on behalf of the State ; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf.

Section 4 (2)—Notwithstanding anything contained in sub-section (1), the proprietor shall continue to retain the possession of his homestead, home-farm land, and in the Central Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting.

Section 13 (1)—On receipt of the statement of claim, or if no such claim is received within the prescribed period, the Compensation Officer shall, after making such enquiry as he thinks fit and giving an opportunity to the claimant to be heard, decide the amount of compensation due to the claimant and record in a statement in the prescribed form the details of the land which shall vest in the State Government after its acquisition in lieu of the payment of such compensation and other details as may be prescribed.

Section 15 (1)—Any person aggrieved by the decision given or the record made under section 13 by the Compensation Officer may appeal to the Deputy Commissioner.....

* * * * *

(3) The Compensation Officer, the Deputy Commissioner or the Settlement Commissioner, may, either on his own motion or on the application filed within the prescribed period by any party interested, review an order passed by himself or his predecessors in office and pass such order in reference thereto as he thinks fit.

* * * * *

Section 40 (as amended on October 22, 1951) :

(1) Any land not included in home-farm but brought under cultivation by the proprietor after the agricultural year 1948-49 shall be held by him in the rights of an occupancy tenant.

(2) Any person becoming an occupancy tenant under rule 1 shall be a tenant of the State.

(3) The Deputy Commissioner shall determine the rent on the land and it shall be payable from the date of the vesting of the proprietary rights.

Section 84.—Except where the provisions of this Act provide otherwise, from every decision or order of a Revenue Officer under this Act or the Rules made thereunder, an appeal shall lie as if such decision or order has been passed by such officer under the Central Provinces Land Revenue Act, 1917 or the Berar Land Revenue Code, 1928, as the case may be.

THE CENTRAL PROVINCES LAND REVENUE ACT, 1917.

Section 45 (1).—A record-of-right for each mahal or estate shall be prepared or revised, as the case may be, by the Settlement Officer at settlement and for such mahals or estates as the Provincial Government may direct, by a Revenue Officer empowered by the Provincial Government in that behalf during the currency of a settlement.

(2) The record of rights of a mahal shall consist of the following documents :—

- (a) Khewat or statement of persons possessing proprietary rights in the mahal, including inferior proprietors or lessees or mortgagees in possession specifying the nature and extent of the interest of each ;
- (b) Khasra or field-book, in which shall be entered the names of all persons cultivating or occupying land the right in which it is held, and the rent, if any, payable ;
- (c) Jamahandi or list of persons cultivating or occupying land in the village ;

* * * * *

(4) The documents specified in sub-section (2) shall be prepared in such form and shall contain such additional particulars as may be prescribed by rules made under section 227.

Section 46.—On the application of any person interested therein or of his own motion, the Deputy Commissioner may without prejudice to other provisions of this Act, modify any entry in the record or rights on one or more of the following grounds—

- (a) that all persons interested in such entry wish to have it modified ; or
- (b) that by a decree in a civil suit it has been declared to be erroneous ; or
- (c) that, being founded on a decree or order of civil Court or on the order of a Revenue Officer, it is not in accordance with such decree or order ; or

* * * * *

Section 47 (1).—The Deputy Commissioner shall cause to be prepared, in accordance with rules made under section 227 for each Mahal, annually or at such longer intervals as may be prescribed, an amended set of the documents mentioned in section 45, sub-section (2), clauses (b), (c) and (d), and the documents so prepared shall be called the “annual papers”.

(2) The Deputy Commissioner shall cause to be recorded, in accordance with rules made under section 227, all changes that have taken place in respect of, and all transactions that have affected, any of the proprietary rights and interests in any land.

* * * * *

The scheme of Act so far as it is relevant to the present enquiry may be summarized thus : On the issue of a notification by the State Government under section 3 of the Act in respect of an estate, all proprietary rights in such estate vest in the State. The Compensation Officer, on a claim made by the proprietor, after making the enquiry prescribed under the said Act, decides the amount of compensation due to him and the details of the land that vests in the State. But the Act saves some interest in the proprietor from its total operation : one of such is lands in the Central Provinces brought under cultivation by the proprietor after the agricultural year 1948-49, but before the date of the vesting : (*see* section 4 (2) of the Act).

Under section 40 (1) of the Act, such a land shall be held by him in the rights of an occupancy tenant ; under sub-section (2) thereof he becomes a tenant of the State ; and under sub-section (3) the Deputy Commissioner shall determine the rent on the land and it shall be payable from the date of the vesting of the proprietary rights. Section 84 confers a right of appeal on an aggrieved party against the order of the Deputy Commissioner to the prescribed authority. There is no provision in the Act which authorizes the Deputy Commissioner to review an order made by him under the said sub-section and, therefore, an order made by him, subject to appeal, becomes final. It is, therefore, manifest that the order made by the Deputy Commissioner in respect of lands in question determining the rent on the basis that the proprietor was an occupancy tenant had become final. If so, the Nistar Officer, *i.e.*, the second appellant, had no jurisdiction to initiate proceedings for reopening the order made in respect of Mouza Sonpairi or in making the order reviewing the earlier order made by him in respect of Mouza Kachna, for the said orders had become final and there is no provision under the Act for reviewing them. But the learned counsel for the appellants contended that section 15 (3) of the Act confers such a power. Under section 15 (3) of the Act, the authority concerned can review an order made by him under section 13 of the Act. Section 13 of the Act deals with an order made by the Compensation Officer deciding the amount of compensation due to the claimant and recording in a statement in the prescribed form the details of the land which shall vest in the State. Neither section 13 nor section 15 (3) has any relevance in

the context of an order made by the Deputy Commissioner under section 40 of the Act.

This conclusion would be sufficient to dispose of the appeals. But, as an argument was made on the construction of section 47 (1) of the Land Revenue Act and as the same was considered by the High Court, we shall also deal with it.

The argument based upon the said provision is relevant more to the nature of the evidence available to the Deputy Commissioner to come to a decision under section 40 of the Act than to the validity or the finality of the order made by him thereunder. The question that a Deputy Commissioner has to decide by necessary implication under section 40 of the Act is whether the proprietor has cultivated the land after the agricultural year 1948-49 and before the vesting of the estate in the State. One of the most important pieces of evidence that will be available to him is the annual papers prepared under section 47 of the Land Revenue Act. It is not disputed that in the annual papers prepared earlier it was shown that the proprietor was cultivating the lands in question after 1948-49. But it is said that under section 47 (1), the Deputy Commissioner can correct the said entry in the year 1952 and 1954 as he purports to do, so as to make the entry to the effect that between 1949 and the date of the investigation the proprietor was not in cultivation of the land. This argument, if we may say so, is contrary to the scope and tenor of the relevant provisions of the Land Revenue Act and the rules made thereunder. Under sections 45, 46 and 47, the provisions whereof we have extracted earlier, the procedure prescribed is as follows : A record-of-rights shall consist of Khewat, Khasra, Jamabandi and other papers ; and they are prepared in the manner prescribed by the rules made under section 227. On the application of any person interested therein or of his own motion, the Deputy Commissioner may modify any entry in the record-of-rights on specified grounds, namely, that all persons interested in such entry wish to have it modified, that by decree in a civil suit it has been declared to be erroneous, that being founded on a decree or order of a civil Court or on the order of a Revenue Officer, it is not in accordance with such decree or order, and that being so founded, such decree or order has subsequently been varied on appeal, revision or review. It will be seen that a mistake in a Khasra or Jamabandi of an earlier year in regard to the factum of cultivation by a particular person is not a ground for modification under section 46 of the Land Revenue Act. Section 47 empowers the Deputy Commissioner to cause to be prepared annually or at such longer intervals as may be prescribed, an amended set of the documents mentioned in clauses (b), (c) and (d) of sub-section (2) of section 45 of the Land Revenue Act, and the documents so prepared shall be called the "annual papers". The rules made under section 227 of the Land Revenue Act are found in Chapter III of the Central Provinces Land Records Manual, Vol. 1, pages 13-16. The rules relevant to the preparation of Khasra and Jamabandi direct the Patwari to record such changes annually as he finds to have taken place after local enquiry and actual inspection. It is, therefore, clear that a record-of-rights consists of Khewat, Khasra, Jamabandi, etc. and till it is revised again it will hold the field. The entries therein can be modified only for the grounds mentioned in section 46 of the Land Revenue Act. The provisions of section 47, if contrasted with those of section 46, make it clear that the said section intends to bring the said documents up-to-date by recording the subsequent changes based on supervening events. The scope of the annual papers is only to record the existing facts on the basis of spot inspection at the beginning of a fasli and to record changes occurring during the course of the year after the year is closed. It is not the province of the annual papers to investigate and decide on the correctness or otherwise of the entries made in the earlier annual papers as on the date they were made.

The said section came under judicial scrutiny of a Division Bench of the Nagpur High Court in *Mangloo v. Board of Revenue*¹. The facts in that case were that on the death of one Gaindoo who was a tenant of *mouza* Matia, on an application made by his nephew and his widow, their names were entered in the annual papers as joint

tenants of the land by the Assistant Superintendent of Land Records ; thereafter, the widow applied to the Superintendent of Land Records for striking off the petitioner's name from the annual papers and her application was allowed ; in appeal, the Additional Deputy Commissioner declined to interfere on the ground that the initial order of the Assistant Superintendent of Land Records was passed by him in his executive capacity and as such the Superintendent of Land Records was competent to modify it in his own executive capacity ; the second appeal preferred to the Board of Revenue was summarily rejected ; and it was contended before the High Court that the decision of the Board of Revenue contravened the provisions of section 47 (1), read with section 33 (2) (c) of the Central Provinces Land Revenue Act, 1917. In that context, the learned Judges of the High Court considered the scope of section 47 (1) of the Land Revenue Act and the rules made under section 227 of the said Act, and observed thus :

"As we read section 47 (1) of the Act and the rules governing it, we are of opinion that these provisions deal only with the preparation of the annual papers and not with their correction if the entries are found to be erroneous. They are only enabling provisions which import no restriction on the power of the Revenue Officers to correct the mistakes or remove any irregularities, committed in the preparation of the annual papers. Neither the annual papers nor the corrected entries affect any questions of title or vested interest of any party. The power of the Revenue Officers in this regard is analogous to the untrammelled right of a person to correct his private documents, which cannot be questioned in a Court of law by any one whose right or interest is not affected thereby."

The learned counsel contends that the said passage comprises conflicting ideas inconsistent with each other—the first part of it denying a right to correct the entries and the second part permitting such corrections. We cannot accept this interpretation of the passage. The learned Judges were dealing with two aspects of the question : one is the scope of the preparation of the annual papers and the other is whether correction of mistakes therein give a cause of action to the person aggrieved. The first they answered by stating that section 47 (1) of the Land Revenue Act and the rules made under the said Act deal only with the preparation of the annual papers and not with their corrections if the entries are found to be erroneous and the other with the right of a party affected by the correction of the mistakes therein. The observations made in regard to the scope of section 47 (1) are made clear by the discussion found earlier in the judgment at page 145. After adverting to the provisions of section 47 and the rules made under the Act governing the preparation of annual papers, the learned Judges observed :

"This would normally be done in the beginning of the agricultural year which, under section 2 (1) of the Act, commences on the first day of June. No changes in the entries are contemplated during the course of the agricultural year and the changes taking place during that period are obviously to be recorded after the year is closed. The action taken by the Superintendent of Land Records and ratified by the Additional Deputy Commissioner has, therefore, no reference to the preparation of the annual papers under section 47 (1) of the Act, and we are not shown any other provision of law which governs it."

The Division Bench held that there was no provision for correcting the wrong entries made in the annual papers, for their scope is very limited. This view was followed by the Full Bench of the High Court in their judgment which is now under appeal. The Full Bench confirmed the view of the Division Bench in the following words :

".....Section 47 (1) of the Central Provinces Land Revenue Act contemplates entering only such changes in the annual papers as take place during the course of the agricultural year. That section, therefore, does not cover a case of correction of the entries on the ground of mistake."

We entirely agree with this view. It follows that the Nistar Officer has no jurisdiction to correct the said entries with a view to reopen the matter already closed under section 40 of the Act. We, therefore, agree with the conclusion arrived at by the High Court.

In the result, the appeals fail and are dismissed with costs. One set of hearing fees.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Sekendar Sheikh and another

.. Appellants *

v.

The State of West Bengal

.. Respondent.

Criminal Procedure Code (V of 1898), section 307—Reference under—When Justified—Acquittal by Sessions Judge of charge of false personation for procuring registration of forged document—High Court if can rely on evidence in respect of that offence for founding convictions for offence under section 467 of the Penal Code (XLV of 1860).

In a Reference under section 307 Criminal Procedure Code if the evidence is such that it can properly support a verdict of guilty or not guilty according to the view taken of the evidence by the trial Court, and if the Jury take one view of the evidence and the Judge is of the opinion that they should have taken the other, the view of the Jury must prevail, for they are the judges of fact. In such a case a Reference under section 307 of the Code of Criminal Procedure is not justified. But if the High Court holds that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the Jury, the Reference will be justified and the verdict of the Jury will be disregarded. It is for the Jury to assess the value of the evidence and if it has accepted the evidence of particular witnesses it could not be said that no reasonable body of men could have accepted that evidence, though the Court of Session was not impressed by the testimony of one such witness.

An item of evidence may corroborate charges for more offences than one, but acquittal of the accused for one such offence will not render that item of evidence inadmissible in assessing the criminality of the accused for another offence corroborated thereby. The question in such a case is not one of admissibility but of weight to be given to the evidence.

The High Court in a Reference under section 307 of the Criminal Procedure Code was not therefore debarred from founding the order of conviction for the offences under section 467 of the Penal Code and abetment thereof of the appellants upon evidence, which corroborated the story of the prosecution in support of these charges merely because that evidence was not accepted by the Sessions Court in considering the charge against them of false personation for procuring registration of the forged document.

Appeal from the Judgment and Order, dated the 25th January, 1961, of the Calcutta High Court in Reference No. 10 of 1960.

D. N. Mukherjee, Advocate, for Appellants.

K. B. Bagchi, Advocate and S. N. Mukherji, Advocate, for P. K. Bose, Advocate, for Respondents.

The Judgment of the Court was delivered by

Shah, J.—The first appellant—Sekender Sheikh—was charged in a trial held before the Additional Sessions Judge, Murshidabad, in the State of West Bengal for the offences of forging a valuable security punishable under section 467, Indian Penal Code and of falsely personating another in such assumed character and presenting a document for registration punishable under section 82 (c) of Indian Registration Act. The second appellant—Hasibuddin Sheikh—was charged with abetment of these offences. The trial for the offences of forging a valuable security and abetment thereof was held by the Sessions Judge sitting with a jury and for the offences under the Registration Act without a jury. The jury brought in a verdict of guilty by a majority of 4 to 3 against the appellants for the offences of forging a valuable security and abetment thereof, but the Judge did not accept the verdict and made a Reference under section 307 of the Code of Criminal Procedure to the High Court of Calcutta, because in his view there was 'absolutely no reliable evidence' against the two appellants in respect of the offence of forging a valuable security and that it was in the interests of Justice to refer the case to the High Court. The Sessions Judge acquitted the two appellants of offences under the Indian Registration Act. The High Court declined to accept the Reference and convicted the two appellants

respectively of the offences punishable under section 467 and section 467 read with section 109 of the Indian Penal Code, and sentenced each appellant to suffer rigorous imprisonment for two years. With certificate of fitness granted by the High Court under Article 134 (1) (c) the appellants have appealed to this Court.

The charges against the first appellant were—

(i) that on or about 15th January, 1958, he had in the town Berhampore forged a *Heba-nama* in respect of certain property in favour of one Ali Hussain purporting to execute the same in the name of one Kaimuddin of Debkundu and that the execution of the document was made with intent to cause the said Kaimuddin to part with his property and to commit fraud; and

(ii) that on the same day he had falsely personated Kaimuddin Sheikh and in that assumed character had presented for registration the *Heba-nama* in the Berhampore Sub-Registry and had affixed his thumb impressions claiming to be Kaimuddin Sheikh.

The second appellant was charged with abetting the first appellant in the commission of the two offences by identifying the first appellant and Kaimuddin Sheikh. At the trial the prosecution examined one Swarana Kumar Dey who testified that he had engrossed the *Heba-nama* in favour of Ali Hussain which was executed by the first appellant purporting to do so as Kaimuddin Sheikh, that the first appellant had impressed his thumb mark on the document before him in token of execution of the *Heba-nama*, that the first appellant had represented himself to be Kaimuddin Sheikh, and that the executant of the document was identified before him as Kaimuddin Sheikh by the second appellant Hasibuddin Sheikh. Kaimuddin Sheikh testified that he had not executed any *Heba-nama* in favour of Ali Hussain and that he had not impressed his thumb-mark on any document in the presence of Swarana Kumar Dey. A certified copy of the *Heba-nama* was shown to the witness and he denied having executed and presented the original thereof before the Sub-Registrar. Evidence was also tendered that the thumb impressions of the two appellants were taken by the investigating officer in the presence of a Magistrate and those specimen thumb impressions were compared with the thumb impressions in the register at the Sub-Registry at Berhampore by a hand writing expert and that the thumb impressions of the first appellant tallied with the thumb impressions in the said register and not with the thumb impressions of Kaimuddin Sheikh. In the view of the High Court, this evidence was sufficient to establish against the two appellants the offences of forging a valuable security and abetment thereof.

It is now well settled that in a Reference under section 307 of the Code of Criminal Procedure if the evidence is such that it can properly support a verdict of guilty or not guilty, according to the view taken of the evidence by the trial Court, and if the Jury take one view of the evidence and the Judge is of the opinion that they should have taken the other, the view of the Jury must prevail, for they are the judges of fact. In such a case a Reference under section 307 of the Code of Criminal Procedure is not justified. But if the High Court holds that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, the Reference will be justified and the verdict of the jury will be disregarded: *Ramanurgh Singh v. Emperor*¹. It appears that the Court of Session was not impressed by the testimony of Swarana Kumar Dey but it was for the jury to assess the value of the evidence. The jury had apparently accepted the evidence of Swarana Kumar Dey and of Kaimuddin Sheikh, and it could not be said that no reasonable body of men could have accepted that evidence.

At the trial, evidence about the specimen thumb impressions of the appellants taken during the course of the investigation were relied upon in support of the prosecution case. This Court has held that there is no infringement of Article 20 (3) of the Constitution merely by tendering evidence of this character, in support of the

case for the prosecution against a person accused of an offence : *The State of Bombay v. Kathi Kalu Oghad*¹. The Court in that case set out certain propositions of which the following are material :—

“(ii) the words ‘to be a witness’ in Article 20 (3) do not include the giving of thumb-impression or impression of palm, foot or fingers or specimen writing or exposing a part of the body by an accused person for identification ;

(iii) ‘self-incrimination’ means conveying information based upon the personal knowledge of the giver and does not include the mere mechanical process of producing documents in Court which do not contain any statement of the accused based on his personal knowledge ;

(iv) in order to come within the prohibition of Article 20 (3) the testimony must be of such a character that by itself it should have the tendency to incriminate the accused ;

In view of this decision counsel for the appellants fairly conceded that he could not challenge the admissibility of evidence relating to the taking of thumb impressions of the first appellant and its use for comparison with the thumb impressions in the Sub-Registry at Berhampore, made at the time of presentation of the document for registration.

It was urged, however, that when the Trial Judge acquitted the two appellants of the offences punishable under sections 82 (c) and 82 (d) of the Indian Registration Act—the offence of false personation and in such assumed character presenting a document, and abetment thereof—and that so long as the order of acquittal was not set aside in an appeal duly presented, the High Court in a Reference under section 307 of the Code of Criminal Procedure was incompetent, relying upon the evidence which was not regarded as reliable in respect of the offences under the Registration Act, to convict the appellants of the offences of forging a valuable security and abetment thereof. It was submitted that as the offences under section 467, Indian Penal Code and section 82 (c), Indian Registration Act, formed part of the same transaction and the case for the prosecution for the former offence was substantially founded on the same evidence which was not accepted by the Trial Court when acquitting the appellants of the latter offence, the High Court could not act upon that evidence to record an order of conviction on the charge for the offence of forging a valuable security. We are unable to accept this argument. Forging a valuable security and presentation of that valuable security for registration are two distinct offences. In support of the case that the appellants were guilty of forging a valuable security the material evidence is that relating to the making dishonestly or fraudulently of a false document of the nature of a valuable security. That evidence consisted of the instructions given at the time of writing of the document, the character of the document, its execution, and the intention of the accused in fabricating the document. The offence of false personation for presenting any document consisted in the presentation of a document before the registering authority by a person claiming to be some one else. An item of evidence may corroborate charges for more offence than one: but acquittal of the accused for one of such offences will not render that item of evidence inadmissible in assessing the criminality of the accused for another offence corroborated thereby. The question in such a case is not one of admissibility but of weight to be given to that evidence. The decision of the Judicial Committee of the Privy Council in *Malak Khan v. Emperor*² negatives the submission of the appellants. In *Malak Khan's case*² the accused was charged before the Court of Session for offences of murder and robbery. He was acquitted by the Trial Judge of the offence of robbery and convicted of the offence of murder. The High Court in appeal against the order of conviction relied upon the evidence which was material to both the charges of robbery and murder, as corroborative of the guilt of the accused for the offence of murder. It was held by the Judicial Committee that the High Court could properly accept the evidence as corroborative of the guilt of the accused for the offence of murder, even though that evidence was not accepted by the trial Court on

1. (1963) 1 S.C.J. 195 : (1963) M.L.J. (CrL) 97 : (1962) 3 S.C.R. 10.

2. (1945) 2 M.L.J. 486 : L.R. 72 I.A. 305. (P.C.).

the charge of robbery. In considering the argument that the evidence could not be relied upon in support of the charge of murder, the Judicial Committee observed:

"The Sessions Judge, it was said, had acquitted the appellant of robbery; he was, therefore not guilty of that offence; no appeal had been taken against that acquittal and therefore no Court was entitled to take into consideration the allegation upon which the accusation of robbery was founded even as corroborative evidence in another case. Their Lordships cannot accept this contention. The learned Sessions Judge did not in fact find the accusation baseless; he only found the crime not proven. But even if he had disbelieved the whole story of the recovery of the stolen property from the appellant, his finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or no."

The High Court was therefore not debarred from founding the order of conviction for the offences under section 467, Indian Penal Code and abetment thereof, of the appellants upon evidence, which corroborated the story of the prosecution in support of those charges merely because that evidence was not accepted by the Sessions Court in considering the charge against them of false personation for procuring registration of the *Heba-nama*.

The appeal therefore fails and is dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. S. DAS GUPTA AND J. C. SHAH, JJ.

Janapareddy Latchan Naidu

.. *Appellant **

v.

Janapareddy Sanyasamma

.. *Respondent.*

Charge—Decree for past and future maintenance charged on three lots of property—Purchase by decree-holder of two of the lots in execution for arrears of maintenance—If extinguishes the charge on remaining property—Right to proceed in subsequent execution against the remaining lot.

A decree created a charge for past and future maintenance on three lots of properties. The decree-holder purchased subject to surcharge two items of the properties in execution of the decree. Subsequently she filed another Execution Petition seeking to bring to sale properties other than those purchased by her in the earlier execution. The judgment-debtor contended that the decree was fully satisfied by the earlier purchase of the two items subject to the charge.

Held: An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment-debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder and those that remain. It is not permissible to seek an analogy from the case of a mortgage. A charge can be enforced against all the properties or severally.

The Court cannot order the charge-holder to proceed against properties in her possession even though it can make an election on behalf of the judgment-debtor and enforce the charge against one item in preference to another belonging to him.

Appeal by Special Leave from the Judgment and Order, dated 28th July, 1959, of the Andhra Pradesh High Court in C.M.A. No. 120 of 1956.

P. Ram Reddy, Advocate, for Appellant.

E. Udayarathnam, V. C. Prashar, and K. R. Chaudhuri, Advocates, for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—The respondent who is the wife of the appellant obtained a decree for maintenance on 9th August, 1949, by which the appellant was ordered to

pay Rs. 3,000 per year to her on the 28th day of February, of every year with interest at 6% per year if the payment was not made on the due date. The decree included ascertained amounts as arrears of past maintenance and other items to which detailed reference is not necessary. In addition to the personal liability the decree created a charge for past and future maintenance on three lots of properties.

The respondent filed Execution Petition No. 91 of 1952 for execution of the maintenance decree and sought to bring the properties charged by the decree to sale. She purchased two items of the properties for a sum of Rs. 20,200 subject to her maintenance charge after obtaining the permission of the Court. Later she filed Execution Petition No. 43 of 1955 seeking to bring to sale properties other than those purchased by her in the earlier execution. The appellant also filed an application under section 47 of the Code of Civil Procedure to record full satisfaction of the decree on the ground that the respondent by purchasing the properties subject to her charge could not maintain a fresh application for the sale of the other properties. The Subordinate Judge of Visakhapatnam upheld the contention of the appellant and dismissed the Execution Petition as not maintainable. The respondent appealed to the High Court. The High Court reversed the decision of the Subordinate Judge and ordered the execution to proceed. The appellant has now appealed after obtaining Special Leave from this Court.

The short question is whether the decree must be held to be satisfied because the respondent purchased in an earlier execution one lot of properties subject to her charge for maintenance. Learned counsel for the appellant contends that the respondent must now look to the properties purchased by her for satisfaction of her claim in respect of maintenance past or future. In the alternative he contends that execution against the properties in his possession cannot proceed till the respondent has first proceeded against the properties with her. In our opinion neither proposition is correct.

The maintenance decree passed by the Subordinate Judge of Visakhapatnam is not only a declaratory decree but also an executory decree. It provides that the appellant shall pay to the respondent Rs. 3,000 per year as maintenance on the 28th day of February of every year as long as she lives. When the first execution was levied the amounts due upto 28th June, 1952, were realised by the sale of the properties of lots 1 and 2. The respondent as the auction-purchaser deposited Rs. 6,010 towards the balance of the purchase price after deducting the maintenance amount under the decree as it then stood. The present execution concerns the sum which fell due between 28th June, 1952, and 28th February, 1955. Included in this sum are Rs. 8,000 towards maintenance and Rs. 867-8-0 towards costs.

The contention of the appellant is that the respondent having purchased the first lot of properties subject to the charge cannot now recover this amount from the properties remaining with the appellant. In other words, the appellant contends that there is some kind of merger of the right under the maintenance decree with the right arising from the auction purchase and the respondent can enforce her right only against those properties which she has purchased and not against properties which remain with the appellant.

The argument involves a fallacy because it assumes that a charge created by a decree on a number of properties disappears when the charge-holder in execution of the charge-decree purchases one lot of properties. An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment-debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder

and those that remain. It is not permissible to seek an analogy from the case of a mortgage. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described a *jus in rem* and the latter as only a *jus ad rem*. In the case of a simple mortgage, there is a personal liability express or implied but in the case of charge there is no such personal liability and the decree, if it seeks to charge the judgment-debtor personally, has to do so in addition to the charge. This being the distinction it appears to us that the appellant's contention that the consequences of a mortgagee acquiring a share of the mortgagor in a portion of the mortgaged property obtain in the case of a charge is ill-founded. The charge can be enforced against all the properties or severally.

In the present case the respondent could proceed at her option to recover the arrears of maintenance as they fell due from any of the properties which were the subject of the charge, that is to say, those which were in the possession and ownership of the appellant and those in her possession and ownership as auction-purchaser. There is nothing in law which requires the respondent to proceed against the properties which she had earlier purchased. There is no question of marshalling of these properties. It is true that the Court may decide which of the properties charged should be sold and in what order and the Court does choose between different properties when ordering sale. To that extent the Court can assist a judgment-debtor. But this can only be in respect of the properties which the judgment-debtor holds and against which the charge-holder wants to proceed. But the Court cannot say to the charge-holder that he must exhaust his remedies over and over again against the properties purchased by him in execution of his charge-decree and subject to his own charge. Therefore, between the appellant and the respondent the Court cannot order the respondent to proceed against properties in her possession even though it can make an election on behalf of the appellant and enforce the charge against one item in preference to another belonging to him.

In our opinion the respondent was entitled to proceed against the remaining properties in the hands of the appellant which continued charged. The Executing Court may, of course, sell only such items as may be sufficient to meet the present dues under the decree but the appellant cannot insist that the respondent should proceed against the properties acquired by her under the first sale. We express no opinion on the question whether the decree can be personally executed against the appellant because that question did not arise here. The appeal accordingly fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND RAGHUBAR DAYAL, JJ.

The General Assurance Society, Ltd.

.. Appellant*

v.

The Life Insurance Corporation of India

.. Respondent.

Life Insurance Corporation Act (XXXI of 1956), sections 7, 10 and 16—Construction and scope—Life Insurance Corporation Rules (1956), Rules 12 and 18—Scope—Composite insurer—"Assets and liabilities"—Dividends declared by Insurance Company and amounts equivalent thereto—If rest in the Corporation—Company showing dividends declared and amounts equivalent thereto as assets and liabilities of the controlled business in balance sheets—If precluded from showing that balance-sheets are wrong—Compensation payable to insurer and capital allocable to controlled business—Set-off—Permissibility—Jurisdiction of Tribunal—Interest on amount of compensation—Power of Tribunal to award.

Company—Declaration of dividend—Effect of—Insurance Act (II of 1938), sections 10, 11, 15, 21, 22 and 23—Scope and effect of—Balance-sheets approved by controller—Correctness of—If conclusive for all purposes—Constitution of India (1950), Article 136—New Plea at late stage—If open.

It cannot be said that in the case of a composite insurer under section 16 (1) of the Life Insurance Corporation Act read with Part A of the First Schedule, compensation should be computed in accor-

dance with the provisions of para 1 or para 2, and paid to the insurer on the basis of the computation which was more advantageous to him and that for the purpose of calculation of amount payable in accordance with para. 1, the amount representing the paid-up capital allocable to the controlled business has no relevance. From the provisions of Rule 18 which lays down the method of allocation of the paid-up capital of a composite insurer, it will be seen that there is an integral connection between the compensation payable to the insurer and the amount representing the capital allocable to the controlled business transferred to the Corporation. The common factor for both the amounts is the annual average surplus allotted to the shareholder and the same surplus must be the basis for calculating both the figures. If two different figures are given for the same surplus, one of the calculations would be wrong and grave injustice would be done to one of the parties. Since the two figures cannot be dissociated, the Corporation would be justified in making a composite offer as regards the compensation payable and the paid-up capital to be allocated. When such a composite offer is made, each part being dependant on the other, the other party—the insurer—cannot by accepting a part of the offer, compel the former to confine its dispute only to that part which is not accepted unless the party offering the composite offer agrees to that course.

The Act contemplates the setting-off of one against the other. Rule 12-A of the Rules confers ample jurisdiction on the Tribunal to effect that intention of the Legislature. Clauses (iv) and (vi) of Rule 12-A make it perfectly clear that a claim for set-off is certainly covered by the wide phraseology of the Rule.

Therefore, where the dispute between the insurer and the Corporation relates not only to the compensation, but to the set-off also, and that dispute is referred to the Tribunal, the latter has jurisdiction to decide that dispute.

Section 7 (1) of the Life Insurance Corporation Act provides that on the appointed day all the "assets and liabilities" appertaining to the controlled business of all insurers shall be transferred to and vest in the Corporation. It cannot be said that the dividends declared and the amounts representing the said dividends fall outside the expression "assets and liabilities" of the controlled business. There is no warrant for holding that under section 7 (1) only the assets and liabilities appertaining to the controlled business of an insurer shall be transferred to and vested in the Corporation and that the dividends declared and the assets equivalent to the said liability are assets and liabilities of company (insurer) and not those appertaining to the controlled business and that therefore they would not vest in the Corporation. The company's assets and liabilities cannot be separated from the assets and liabilities of the controlled business. When a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his share of the dividend for which he can sue at law; the declaration does not make the company a trustee of the dividend for the shareholder. The amount representing the dividends continue to be a part of the assets of the company.

However, in the case of a composite insurer, when the dividends declared and the assets equivalent to that liability appertain not only to the life business but also to the general business of the insurer, only such part of the said assets and dividends allocable to the controlled business shall be transferred to the Corporation under section 7 (1) and not the entire dividends and the assets representing the same. Section 10 of the Act and Rule 18 of the Rules would make this clear.

The fact that for the sake of convenience the insurer has shown all his assets and liabilities as part of the life insurance business in the balance-sheets approved by the Controller of Insurance under the Insurance Act (1938) would not make any difference, and the insurer cannot be precluded from questioning the correctness of those balance-sheets. There is nothing in the Insurance Act which says that the correctness of the balance-sheets certified by the Controller is conclusive for all purposes and that it cannot be questioned in a collateral proceeding. For the purposes of that Act, the balance-sheets would be accepted as correct. But the Act does not, expressly or by necessary implication, oust the jurisdiction of the Courts and tribunals from going into the correctness of the balance-sheets.

There is also no provision in the Life Insurance Corporation Act making the contents of the said balance-sheets final for the purpose of transfer to and vesting in the Corporation of the assets and liabilities of the insurer. They certainly afford valuable evidence in an inquiry before the Tribunal, but the contents of the balance-sheets can be proved to be wrong.

Where an insurer does not ask for apportionment of the dividends as between the life business and the general business before the Tribunal or in the petition for Special Leave or even at the stage of arguments, he cannot be permitted to ask for it at a very late stage. The Supreme Court will not be justified in the exercise of its extraordinary jurisdiction under Article 136 of the Constitution to permit the appellant (insurer) to raise the plea for the first time before the Supreme Court and to remand the matter to the Tribunal for apportionment of the dividends and the corresponding assets.

The Life Insurance Tribunal to which a dispute is referred under section 18 of the Life Insurance Corporation Act has jurisdiction to award interest to an insurer on the amount of compensation awarded to him.

Appeal by Special Leave from the Order dated 17th February, 1958, of the Life Insurance Tribunal at Nagpur in Case No. 17/XVI-A of 1957.

M. C. Setalvad, Senior Advocate (*S. N. Andley*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Appellant.

C. K. Daphtary, Attorney-General for India and *S. T. Desai*, Senior Advocate, (*S. J. Banaji* and *K. L. Hathi*, Advocates, with them), for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is directed against the order of the Life Insurance Tribunal, hereinafter called the "Tribunal", determining the dispute that was referred to it under section 16 of the Life Insurance Corporation Act, 1956 (XXXI of 1956), hereinafter called the Act.

The appellant is a company duly incorporated under the Indian Companies Act, 1882, and the Insurance Act, 1938. Prior to December, 1957, its registered office was at Ajmer, but now it is in Calcutta. It was a composite insurer carrying on life insurance and general insurance business. The Act was passed to provide for the nationalization of life insurance business in India by transferring all such business to a Corporation established for the purpose. The Act came into force on July 1, 1956. On September 1, 1956, under section 3 of the Act the Central Government established a Corporation called the Life Insurance Corporation of India, hereinafter called the Corporation, which is the respondent in this appeal. Under section 7 of the Act on the appointed day, which was September 1, 1956, all the assets and liabilities appertaining to the controlled business of all insurers were statutorily transferred to and vested in the Corporation. Accordingly, the controlled business of the appellant as defined under the Act, *i.e.*, all the business pertaining to its life insurance business, was transferred to and vested in the Corporation. Thereafter disputes arose between the appellant and the respondent in the matter of ascertainment of the compensation payable to the appellant and in respect of incidental and consequential matters thereto. By a letter dated May 21, 1957, the respondent offered to pay to the appellant towards compensation certain amount after setting-off the amount due to it from the appellant in respect of part of the paid-up capital of the controlled business and assets representing that part. By letter dated August 9, 1957, the appellant refused to accept the said offer *in toto*. On August 20, 1957, the respondent wrote a letter to the appellant informing it that as its offer was not accepted by the appellant, it had referred the dispute to the Tribunal. In due course, both the parties, *i.e.*, the appellant and the respondent, appeared before the Tribunal and filed their respective statements; and the Tribunal framed as many as 8 issues. Issues Nos. 5, 6-A, 7-A and 7-B which are relevant to the present enquiry read thus :

Issue 5.—Whether the petitioner (appellant herein) is entitled to the sum of Rs. 12,36,415 or in the alternative to Rs. 6,60,369 or in the further alternative to Rs. 5,95,764 as worked out respectively in Annexures A to C to the Statement of Claim.

Issue 6-A.—Whether the petitioner is entitled to the unpaid dividends attributable and pertaining to the General Insurance Business of the petitioner as claimed in paragraph 6 of the Statement of Claim.

Issue 7-A.—Whether the Tribunal has jurisdiction to grant interest on the amount of compensation.

Issue 7-B.—If so at what rate and for which period.

On Issue 5 the Tribunal calculated the amount payable by the respondent to the Appellant on the following lines: Amount payable towards compensation to the appellant was Rs. 5,95,764; out of the allocable paid-up capital of Rs. 2,79,683, the respondent had already received assets equivalent to Rs. 1,35,919; the balance receivable under that head was, therefore, Rs. 1,43,764; out of the sum of Rs. 5,95,764 payable to the petitioner-appellant, the respondent was entitled to deduct Rs. 1,43,764; and the balance payable by the respondent to the appellant was Rs. 4,52,000. Briefly stated what the Tribunal did was that it ascertained the compensation payable to the appellant and set-off against that amount the balance of the amount due to it from the appellant towards the allocable paid-up capital.

On Issue 6-A it held that the appellant showed the unpaid dividends in the balance-sheets as the liability of the life department, that it always regarded it as a liability appertaining to the life department and that as it was impossible to allocate the unpaid dividends of any shareholder to the several businesses carried on by the

insurer, it would rely upon the books of accounts of the insurer to find out whether it was the liability of one department or the other. On that reasoning it held that the entire liability for the unclaimed dividends and assets equivalent to that liability appertained to the controlled business, and, therefore, statutorily vested in the respondent-Corporation.

On Issues 7-A and 7-B the Tribunal held that it had no jurisdiction to award interest on the amount of compensation. On the basis of the said findings the respondent was directed to pay to the appellant within two weeks a sum of Rs. 4,52,000 less any sum that might have been paid by the respondent to the appellant by way of admitted compensation. Hence the appeal.

Mr. Setalvad, learned counsel appearing for the appellant, raised before us the following three points : (1) the Tribunal had no jurisdiction to decide on the question of the capital allocable to the controlled business as there was no dispute therebetween between the parties and the said question therefore, not referred to it ; (2) the liability of the appellant-Company for unclaimed dividends and assets equivalent to the liability were not transferred to and vested in the Corporation under section 7 (1) of the Act ; and (3) the appellant would be entitled to interest on the amount of compensation payable to it and the Tribunal had jurisdiction to award the same.

On the first question the learned counsel took us through the correspondence that passed between the parties and the pleadings before the Tribunal, and contended that the said correspondence, pleadings, and the issues disclosed that there was no dispute between the parties in respect of the capital allocable to the controlled business and, therefore, the Tribunal went wrong in deducting under that head a higher amount than was agreed upon between the parties. As the answer to this argument mainly depends upon the said correspondence and the pleadings, we shall briefly scrutinize them. On May 21, 1957, the respondent offered to the appellant to pay a sum of Rs. 3,30,023 in full satisfaction of the compensation payable to the appellant for the acquisition of its controlled business under the Act, and to set-off against the said sum an amount of Rs. 1,71,365 being the part of the paid-up capital of the appellant-Company and assets representing such part, which had been allocated to the controlled business of the appellant-Company in accordance with Rule 18 of the Life Insurance Corporation Rules, 1956, made under the Act. The letter concluded thus :

"As the aforesaid assets have not yet been transferred to the Corporation the said amount of Rs. 1,71,365 will be set-off against, and form a deduction from, the amount of compensation payable to your Company."

The offer was couched in clear and unambiguous terms. It was a composite offer. The letter could not be construed to contain two different matters, one an offer of compensation and the other a demand for payment of the amount due to the respondent in respect of the paid-up capital allocable to the controlled business. On the other hand, in express terms the offer was for payment of compensation after setting-off the amount due to the respondent. On August 9, 1957, the appellant wrote a letter in reply to the respondent's. Therein an attempt was made to split up the offer. The appellant stated that the amount of compensation offered in the letter, namely, the sum of Rs. 3,30,023 was not acceptable to it. In regard to the amount of capital allocated by the Company to the controlled business, it stated that the assets worth Rs. 1,35,919 has already been transferred to the respondent and that having regard to the amount claimed by the respondent under that head, only a sum of Rs. 35,446 remained to be transferred to the Corporation by it. It asked that the said amount might be deducted from the amount of compensation that might be ordered and decreed to be paid to it by the Tribunal. It would be seen from this letter that the appellant accepted a part of the offer and rejected the rest. On August 20, 1957, the respondent replied to the appellant that as its offer was not accepted, it had sent the necessary papers to the Tribunal. On August 22, 1957, the appellant received a notice from the Tribunal. The preamble to that notice read :

"Whereas you have not accepted the amount determined by the Corporation and offered in full settlement of the compensation payable to you under the Act and whereas you have requested the Corporation to have the matter referred to the Tribunal for decision and whereas the Corporation has so referred the matter."

This clearly shows that the dispute before the Tribunal arose as the appellant did not accept the amount determined by the Corporation and offered in full settlement of the compensation payable to the appellant under the Act. It does not indicate that the accepted part of the offer was considered to be a closed matter between the parties and the disputed part only was put in issue. On 13th September, 1957, the appellant wrote a letter to the respondent requesting it to pay the amount of compensation offered by it subject to adjustment on the basis of the decision to be given by the Tribunal. It also requested the respondent to supply to it a copy of the calculation sheet to show how the amount of compensation offered by it had been arrived at. On the same day, the respondent sent a copy of the said calculation sheet, which clearly showed not only the amount of compensation payable but also the amount of paid-up capital allocable to the controlled business deductible therefrom. On September 17, 1957, the respondent made it clear to the appellant that if the appellant agreed to accept the amount offered by it in full satisfaction of the compensation payable to the appellant under the Act, the respondent could make payment of the said amount to it. It is, therefore, clear that the dispute between the parties related to the composite offer made by the respondent, i.e., the compensation payable as well as the set-off of the amount due to the respondent calculated under Rule 18 of the Rules made under the Act.

That this was the dispute is also apparent from the pleadings before the Tribunal. On October 10, 1957, the appellant filed a statement before the Tribunal and in Para 4 thereof, the contents of the letter written by the respondent on May 21, 1957, were extracted. How the appellant understood the scope of the offer is clear from the following extract from the said paragraph :

"By and under the said letter the defendant *inter alia* stated that part of the paid-up capital of the claimant, and assets representing such part, which had been allocated to the controlled business of the claimant in accordance with Rule 18 of the Life Insurance Corporation Rules, 1956, amounted to Rs. 1,71,365 and that as the aforesaid assets had not till then been transferred to the defendant, the said amount of Rs. 1,71,365 would be set-off against, and form a deduction from the amount of compensation payable to the claimant."

The appellant, therefore, understood the offer as a composite one. In Para. 5 thereof, the appellant gave the contents of its reply. On November 7, 1957, the respondent filed a statement before the Tribunal and in Para. 3 thereof it reiterated its offer of compensation of Rs. 3,30,023 with a claim for set-off on a calculation made in accordance with Rule 18 of the Rules. Throughout the correspondence and in the pleadings the respondent was consistently standing by the composite offer. It did not, either expressly or by necessary implication, accept the attempt made by the appellant to split up the said offer. When one party makes a composite offer, each part thereof being dependent on the other, the other party cannot by accepting a part of the offer, compel the other to confine its dispute only to that part not accepted, unless the party offering the composite offer agrees to that course. In this case not only there was no such agreement between the parties, but the respondent was throughout insisting upon the acceptance by the appellant of the entire offer in full settlement of the appellant's claim against the respondent.

Reliance is placed upon the circumstance that there was no specific issue framed by the Tribunal in respect of the paid-up capital allocable to the controlled business of the appellant. But the pleadings clearly pinpoint the dispute between the parties in respect of the set-off. As we will indicate later in our judgment, the calculation of the amount due towards paid-up capital allocable to the controlled business depends on a basic factor that goes into the calculation of the amount due towards compensation. It was presumably found not necessary to frame a specific issue in respect thereof, for if that factor was settled one way or other, the amount due under the said head was only a matter of calculation and could certainly be taken into consideration in awarding the set-off under the general issue, Issue-8.

Further, it does not appear from the order of the Tribunal that this question was raised before it. Indeed, it appears that both the parties proceeded on the basis that the calculation of the amount due towards compensation and that due towards paid-up capital allocable to the controlled business were linked together and that by calculating the said two figures on the same basis one should be deducted from the other. If the question raised before us had been raised before the Tribunal one would expect the Tribunal to deal with that matter. On the other hand, Para. 19 of the order shows that the appellant did not dispute the manner of the set-off on the basis of the amount of compensation ascertained by the Tribunal.

Mr. Setalvad contended that under section 16 (1) of the Act, read with Part A of the First Schedule, compensation should be computed in accordance with the provisions contained in Para. 1 or Para. 2 and paid to the insurer on the basis of the computation which was more advantageous to him and that for the purpose of calculating the compensation payable in accordance with Para. 1 the amount representing the paid-up capital allocable to the controlled business had no relevance. He illustrated his argument by taking us through the alternative calculations made by the Tribunal and pointing out that while in the calculations made in terms of Para. 2 of Part A of the First Schedule the paid-up capital allocable to the controlled business went into the calculations, in the calculations made in accordance with Para. 1 that item was not taken into consideration at all. Though *prima facie* this argument appears to be plausible, a deeper scrutiny of the figures indicates that there is an integral connection between the compensation and the amount representing the paid-up capital allocable to the controlled business.

Under rule 18 (1) of the Rules, in respect of a Part A insurer like the appellant, the paid-up capital allocable to the controlled business shall be that proportion of the total paid-up capital of the insurer which the annual average of the profits from the controlled business during the period covered by the relevant actuarial investigation bears to the total of the annual average of profits plus two times the annual average of the profits from other business during that period. The factor will be,

Annual average of surplus

Total of annual average of surplus *plus*
two times the annual average of profit
from non-life business.

or shortly stated,

L

L+2 non-L

On that basis the factor will be,

Rs. 15,512.6

Rs. 90,523.8 (*i.e.*, 15,512.6+75, 011.2)
=0.17136488

Rs. 15,512.6 being the annual average of surplus from the controlled business, as determined by the Corporation, and Rs. 75,011.2 being twice the annual average of profits from non-life business. It is not disputed that the paid-up capital of the Company was Rs. 10,00,000. If the factor was applied, the capital allocable to the controlled business would be, $0.17136488 \times \text{Rs. } 10,00,000 = \text{Rs. } 1,71,365$. The compensation to be given by the Corporation to the insurer to whom Part A of the First Schedule to the Act applies—it is conceded that the said Part applies to the appellant—is 20 times the annual average of the share of the surplus allotted to the shareholders of the appellant. On the basis that Rs. 15,512.6 was the annual average of the surplus allotted to the shareholders of the appellant, the Corporation ascertained the amount of compensation at a sum of Rs. 3,30,023 and offered the same to the appellant.

It will be seen from the aforesaid calculations that there is an integral connection between the compensation payable to the insurer and the amount representing the capital allocable to the controlled business transferred to the Corporation. The common factor for both the amounts is the annual average of the surplus allotted to the shareholders. The same surplus must be the basis for calculating both the figures. Obviously two different figures cannot be given for the same surplus. If two different figures are given for the same surplus, not only one of the calculations must be wrong, but also grave injustice would be done to one of the parties. As the two figures cannot be disassociated, the respondent made a composite offer.

What happened before the Tribunal is this : the appellant in Annexure C to the Statement of Claim claimed that the annual average of the surplus deemed to be allocated to the shareholders was Rs. 29,125.2 ; the respondent stated that it was only Rs. 15,512.6 ; and the Tribunal came to the conclusion that the said annual average of the surplus was Rs. 29,125.2. The result was that the calculations made by the Corporation under the said two heads were upset. On that basis, applying the same formula the compensation was raised to a sum Rs. 2,79,683.18. The Tribunal, therefore, rightly set-off the said figures one against the other and held that the balance, after making other admitted deductions, was payable to the appellant.

The above discussion clearly establishes the reason why a composite offer was made and why the dispute in respect of the said offer could not be split up into two parts. Both the amounts are payable under the provisions of the Act. Calculation of both depends upon the same "surplus". It is, therefore, reasonable to hold that the Act contemplates the setting-off one against the other.

Rule 12-A of the Rules confers ample jurisdiction on the Tribunal to effectuate the said intention of the Legislature. The material part of rule 12-A reads :

"The Tribunal may exercise jurisdiction in the whole of India and shall have power to decide or determine all or any of the following matters, namely :—

* * * *

(iv) all claims for compensation payable under the Act to insurers whose controlled business has been transferred to and vested in the Corporation and all matters connected with the determination, payment and distribution of such compensation.

* * * *

(vi) such supplemental, incidental or consequential matters which the Tribunal may deem it expedient or necessary to decide or determine for the purpose of securing that the jurisdiction vested in it under the Act and in respect of matters referred to above is fully and effectively exercised."

A combined reading of clauses (iv) and (vi) of rule 12-A of the Rules makes it abundantly clear that a claim for set-off of the nature that we are now considering is certainly covered by the wide phraseology of clause (vi) of the said rule. This rule, it is said, was introduced after the decision on the dispute in the instant case was given. Be it as it may, the material clauses of the rule only recognize the pre-existing principles inherent in the relevant dispute under the provisions of the Act.

This Court in *National Insurance Co. v. Life Insurance Corporation of India*¹, held that the claim for set-off was within the jurisdiction of the Tribunal. Hidayatullah, J., speaking for the Court, observed at page 1178 :

"No doubt, the Act says that the Corporation shall pay the compensation due to the Company but in another part it also says that the Company shall pay in lieu of the assets appertaining to the controlled business a sum of Rs. 6,00,000. These two provisions of law must be read together and in our opinion the Corporation was entitled to a set-off in respect of the amount due to it and the Tribunal was perfectly right when it ordered such a set-off."

We, therefore, hold that the dispute between the parties related not only to the compensation, but to the set-off also, that that dispute was referred to the Tribunal and that the Tribunal had jurisdiction to decide that dispute. The Tribunal in paragraph 19 of its order rightly set-off the amounts due from the one to the other and held that the balance of Rs. 4,52,000 was only due to the appellant towards compensation.

The next question relates to the outstanding dividends or assets equivalent thereto taken possession of by the Corporation. Some material facts may be stated. The paid-up capital of the company was Rs. 10,00,000 divided into 40,000 shares of Rs. 25 each fully paid. On September 28, 1953, the appellant declared a dividend of 4% amounting to a sum of Rs. 40,000; again on September 29, 1954, it declared a dividend of 4% amounting to a sum of Rs. 40,000; and again in the year 1955 it declared a dividend of 6% amounting to Rs. 60,000. In regard to the said amounts so declared certain payments were made to some of the shareholders and the balance of the outstanding dividends as on December 31, 1955, was Rs. 89,680. The balance-sheets of the company showed the unpaid dividends as the liability of the life department. Though the amounts representing the said dividends are not specifically shown in the assets, it cannot be disputed that the said amounts must have been included in the assets or cash shown in the balance-sheets. The result was that the entire liability for the unclaimed dividends and assets equal to that liability were taken over by the respondent. The Tribunal relying on the books of account, the balance-sheets and other documents of the Company held that the liability was only that of the life insurance business.

Mr. Setalvad, learned counsel for the appellant, contended that under section 7(1) of the Act only the assets and liabilities appertaining to the controlled business of an insurer shall be transferred to and vested in the Corporation and that the dividends declared and the assets equivalent to the said liability were assets and liabilities of the Company and not those appertaining to the controlled business and, therefore, they did not vest in the Corporation. Section 7 (1) of the Act reads :

"On the appointed day there shall be transferred to and vested in the Corporation all the assets and liabilities appertaining to the controlled business of all insurers."

An attempt is made to separate the Company's assets and liabilities from the assets and liabilities of the controlled business, and an argument is advanced that on a declaration of dividends the said dividends and the assets corresponding thereto cease to appertain to the business but belong to the Company. The question, therefore, is whether the dividends declared and the amounts in the hands of the Company representing them appertain to the controlled business of the insurer. Before we answer this question it will be convenient to know precisely the legal effect of a declaration of a dividend of a Company. In *Palmer's Company Law*, 20th Edn., the legal position is stated thus, at page 625 :

"Where a dividend is declared and becomes payable, it is a debt—in England as will be explained in the following section, a speciality debt—and each shareholder is entitled to sue the Company for his proportion. Until the dividend is declared and payable, the shareholder has no right to sue."

In *In re Severn and Wye Severn Bridge Railway Co.*¹, *Romer, J.*, observed thus :

"In the first place, they contend that the Company was in the position of a trustee for them of these dividends. In my judgment, this was not so. The declaration that the dividend was payable did not make the company a trustee of it for the shareholders."

The learned Judge said at page 564 thus :

"The dividends in question were declared and became payable more than twenty years before the present claims were made, and constituted debts due to the shareholders for which they could have sued at law, as was pointed out by *Lindlay, L.J.*, in the passage in his treatise on *Company Law* (page 437), which was cited in the argument before me."

This decision is an authority for the view that when a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his share of the dividend for which he can sue at law and the declaration does not make the Company a trustee of the dividend for the shareholder. Indeed, this legal position is not disputed. If so, the shareholders in the present case were only in the position of creditors in respect of the dividends declared in their favour and the amounts representing the dividends continued to be a part of the assets of the Company; and indeed the balance-sheets filed in the present case show that a parti-

1. L.R. (1896) 1 Ch. D. 559, 565.

cular amount had been earmarked for payment of dividends. To put it differently, the amount equivalent to the dividends declared continued to be a part of the assets of the Company and the dividends continued to be its debts. The said assets were part of the general assets of the Company and the said liabilities were part of the general liabilities of the Company. There cannot be any difference in law, in the matter of ownership of the assets, between a part of the assets equivalent to the dividends declared and the rest of the assets.

With this background let us scrutinize the provisions of section 7 (1) of the Act. Under that sub-section, on the appointed day there shall be transferred to and vested in the Corporation all the assets and liabilities appertaining to the controlled business of all insurers. The first question is whether the dividends declared and the amounts representing the said dividends fell outside the expression "assets and liabilities" of the controlled business. It is said that though they are part of the assets and liabilities of the Company, they do not appertain to the controlled business. The word "appertain" in its ordinary meaning is "belong to, be appropriate to, relate to". The assets and liabilities must, therefore, belong to the controlled business of the insurer. That is no doubt a limitation or qualification imposed or made on "assets and liabilities". As the section is providing for the transfer of assets and liabilities of a Company which may have business other than life insurance business, it has become necessary to say that the said assets and liabilities are those that pertain only to the controlled business. The antithesis is not between the Company and its business but between the controlled business and the other businesses of the insurer. That this is so is clear from the exhaustive enumeration of the categories of property in sub-section (2) of section 7 of the Act constituting assets appertaining to the controlled business. Sub-section (2) of section 7 embodies an inclusive definition and in a sense it enlarges the meaning of the word "assets". The enumerated categories of assets include both movable and immovable properties and "all other interests and rights in or arising out of such property as may be in the possession of the insurer." Liabilities shall be deemed to include all debts and obligations of whatever kind existing at the time of the statutory transfer. All the said rights and liabilities pertaining to the controlled business are transferred on the appointed day to the Corporation. The said enumeration does not leave any margin for allotment of any assets to the Company as distinguished from its controlled business. To illustrate, take the case of a Company doing only the life insurance business. How is it possible to hold that the declared dividends and the assets representing the said dividends are those of the Company unconnected with the business? That may be so if the declared dividends are held in trust by the Company for a shareholder. But, as we have pointed out, the settled law on the point does not countenance any such concept of trust. The shareholders can only realise their dividends from the assets of the business, for they include the amounts representing the dividends. In any view, the definition of assets and liabilities of a controlled business in sub-section (2) of section 7 of the Act is certainly comprehensive to take in the said declared dividends and the corresponding assets. We cannot, therefore, accept this argument.

Even so, it is contended that, the appellant being a composite insurer, the dividends declared and the assets equivalent to that liability appertained not only to the life business but also to the general business of the insurer and, therefore, under section 7 (1) of the Act only such part of the said assets and dividends allocable to the controlled business shall be transferred to the Corporation, but the Tribunal wrongly held that the entire dividends and the assets representing the same were transferred to the Corporation. To appreciate this argument, some of the relevant provisions may be noticed. We have already noticed section 7 (1) of the Act whereunder all the assets and liabilities appertaining to the controlled business of the insurer shall be transferred to and vested in the Corporation. *Explanation (a)* to section 7 of the Act reads :

"The expression 'assets appertaining to the controlled business of an insurer' in relation to a composite insurer, includes that part of the paid-up capital of the insurer or assets representing

such part which has or have been allocated to the controlled business of the insurer in accordance with the rules made in this behalf."

A further clarification is found in section 10 of the Act, which reads :

(1) "For the removal of doubts it is hereby declared that in any case where an insurer whose controlled business has been transferred to and vested in the Corporation under the Act is a composite insurer, the provisions of the preceding sections shall only apply to the extent to which any property appertains to his controlled business and to rights and powers acquired, and to debts, liabilities and obligations incurred and to contracts, agreements and other instruments made by the insurer for the purposes of his controlled business and to legal proceedings relating to those purposes and the provisions of those sections shall be construed accordingly."

(2) The Central Government may, by rules made in this behalf, provide—

* * * * *

(b) for the allocation of the paid-up capital or assets representing such paid-up capital, as the case may be, between the controlled business of the insurer and any other business ;

* * * * *

(c) for the apportionment and the making of financial adjustments with respect to any debts, liabilities or obligations incurred by any such insurer partly for the purposes of his controlled business and partly for other purposes and for any necessary variation of mortgages and encumbrances relating to such debts, liabilities or obligations."

Rule 18 of the Rules provides for the method of allocation of the paid-up capital of the composite insurer. These provisions make it clear that in the case of a composite insurer only such part of the assets and liabilities allocable to the controlled business shall be transferred to and vested in the Corporation. As the dividends declared and the assets representing the said dividends appertain to the composite business, there is force in the argument of the learned counsel that only a part of such assets and liabilities referable to the controlled business could be transferred to and vested in the Corporation, and that the rest should be left with the insurer. This argument is sought to be met by the learned Attorney-General by contending that the appellant showed the said assets and liabilities as part of the life insurance business in the balance-sheets duly approved by the Controller under the Insurance Act, 1938 (IV of 1938), and, therefore, it is precluded from questioning the correctness of the said balance-sheets. This contention takes us to the consideration of the Insurance Act, 1938. Sections 10 (1) and 11 of the said Act provide for separation of accounts and funds, and maintaining of accounts and balance-sheets for different businesses in the insurance line. Under section 10 (1), an insurer shall keep a separate account of all receipts and payments in respect of each class of insurance business mentioned therein ; and under clause (2) thereof, if he carried on the business of life insurance, all receipts due in respect of such business shall be carried to and shall form a separate fund, the assets of which shall, after the expiry of six months, be kept distinct and separate from all other assets of the insurer. Section 11 of the Insurance Act enjoins every insurer in respect of insurance business transacted by him to prepare with reference to every year in accordance with the regulation contained in Part I of the First Schedule a balance-sheet in the Forms set forth in Part II of that Schedule. Form A has two columns, one under the heading "Life Annuity Business" and the other under the heading "other classes of business". Under section 15 (1) of the Insurance Act, the audited accounts and statements referred to in section 11 or section 13 (5) and the abstract and statement referred to in section 13 shall be furnished as returns to the Controller within the time prescribed thereunder. Under section 21 of the said Act, if it appears to the Controller that any return furnished to him under the provisions of the Insurance Act is inaccurate or defective in any respect, he may get the necessary information from the insurer and decline to accept the same unless the inaccuracy has been corrected and the deficiency has been supplied before the time prescribed. Under sub-section (2) of section 21 of the said Act, the Court may, on the application of an insurer and after hearing the Controller, cancel any order made by the Controller or may direct the acceptance of any return which the Controller has declined to accept, if the insurer satisfied the Court that the action of the Controller was in the circumstances unreasonable. Section 22 of the said Act confers power on the Controller to order revaluation. Section 23 thereof says that every return furnished to the Controller, which has been certified by the Controller to

be a return so furnished, shall be deemed to be a return so furnished and under sub-section (2) thereof every document, purporting to be certified by the Controller to be a copy of a return so furnished, shall be deemed to be a copy of that return and, shall be received in evidence as if it were the original return, unless some variation between it and the original return is proved. The first question is whether under the provisions of the Insurance Act the contents of a certified balance-sheet of an insurer are binding on the insurer in a collateral proceeding. The provisions of the Insurance Act do not say that the correctness of the balance-sheet certified by the Controller is conclusive for all purposes or that it could not be questioned in a collateral proceeding. For the purpose of the Insurance Act it would be accepted as correct. The said Act does not, expressly or by necessary implication, exclude the jurisdiction of Courts and tribunals from going into the correctness of the said balance-sheets. There is also no provision in the Life Insurance Corporation Act making the contents of the said balance-sheets final for the purpose of transfer to and vesting in the Corporation the assets and liabilities of the insurer. It certainly affords valuable evidence in an enquiry before the Tribunal; but the contents of the balance-sheets can be proved to be wrong.

Mr. Setalvad argued that for the purpose of convenience of disbursement of dividends, the entire amount is shown as appertaining to the life insurance business, as the head office in Ajmer was only dealing with life Insurance business and making the disbursements. Be it as it may, it is obvious in this case that the dividends declared appertained to the composite business and only a part of them appertained to the controlled business. The relevant entries in the certified balance-sheets, are, therefore, not correct. If so, it follows that under section 7 (1) of the Life Insurance Corporation Act on the appointed day only such part of the said dividends and the corresponding assets appertaining to the controlled business were transferred to and vested in the Corporation.

The next question is how to apportion the said assets and liabilities between the Corporation and the Company. Before the Tribunal the appellant did not ask for apportionment of the dividends but wanted a transfer of the entire liability to it with the assets corresponding to the liability undertaking to reimburse the respondent for any claim of the shareholders against it. In the petition for Special Leave the appellant did not specifically ask for apportionment of the dividends between the Corporation and the Company. Even at the time of arguments Mr. Setalvad sought to sustain the claim of the appellant on a construction of section 7 of the Act, namely, that the said assets and liabilities only appertained to the Company, though at a later stage he pressed for apportionment as an alternative argument. The main contention we have rejected. Even if the apportionment was made, the allocable assets and liabilities would cancel each other, for both the Corporation and the Company would be liable to pay the entire amounts so allotted to the shareholders. But there may be a practical advantage to one or other of the parties in so far as a shareholder or shareholders may not care to claim the dividends payable to him or them. In the circumstances, we do not think we are justified in exercise of the extraordinary jurisdiction under Article 136 of the Constitution to permit the appellant to raise the plea for the first time before us and to remand the matter to the Tribunal for apportionment of the dividends and the corresponding assets. We, therefore, cannot accede to the request of Mr. Setalvad for this indulgence at this very late stage of the matter.

The last point relates to the payment of interest. Both the parties agreed that in view of the decision of this Court in the *National Insurance Co. Ltd. v. Life Insurance Corporation of India*¹, the appellant will be entitled to interest at 4% on the sum of Rs. 4,52,000 from May 24, 1957, to the date of payment.

In the result, subject to the said modification, the appeal is dismissed with proportionate costs.

P.R.N.

Interest allowed.
Appeal otherwise dismissed.

1. (1963) 1 S.C.J. 578 : (1963) 1 Comp. L.J. 265 : A.I.R. 1963 S.C. 1171.

THE SUPREME COURT OF INDIA.

PRESENT : A. K. SARKAR, M. HIDAYATULLAH AND K. C. DAS GUPTA, JJ.

The Mahalakshmi Mills, Ltd., Bhavnagar and The Master Silk Mills, Ltd., Bhavnagar

.. Appellants*

v.

The Commissioner of Income-tax, Bombay North, Kutch and Saurashtra, Ahmedabad

.. Respondent

*Saurashtra Income-tax Ordinance, 1949, section 13 (5) (b)—Written down value—Depreciation allowable, but not claimed or allowed in the past—Whether deductible.**Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, paragraph 2.*

Under section 13 (5) (b) of the Saurashtra Income-tax Ordinance, 1949 "written down value" in respect of assets acquired by an assessee before the promulgation of the Ordinance was to be arrived at by deducting from the actual cost "all depreciation which would have been allowed to him if the Indian Income-tax Act, 1922 was in force in the past." The assessees who were assessed to tax under the Ordinance for the year 1948-49 contended that in respect of assets acquired by them before 1948, the words of the section did not authorize the deduction of all depreciation *allowable* under the Indian Income-tax Act, 1922. This contention did not prevail with the assessing authorities and the High Court.

The assessees obtained depreciation allowance under the Bhavnagar War Profits Act, an enactment passed in the Bhavnagar State before it became a component State of Saurashtra, which became a Part B State in 1950. The Indian Income-tax Act 1922 was extended to Saurashtra and other Part B States by the Finance Act, 1950, under which the Central Government was empowered to issue orders for the removal of difficulties encountered in the extension of the Indian Income tax Act. Under paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, in arriving at the written down value of assets, "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super tax or any law relating to tax on profits of business" should be deducted. The assessees who were assessed to tax under the Indian Income-tax Act, 1922 for the year 1951-52, objected to the deduction of depreciation granted to them under the Bhavnagar War Profits Act in arriving at the written down value of their assets, on the score that the Bhavnagar Act was not a law of a Part B State, Bhavnagar State as such not having become part of a Part B State at the material time. This contention was overruled by the assessing authorities and by the High Court. On appeal, by Special Leave

Held, that the words "all depreciation which would have been allowed if the Indian Income-tax Act, 1922 was in force in the past" are apt and sufficient to express the intention that if the Indian Income-tax Act, 1922, which was not in force in the State before, had been in force, the depreciation that would have been allowed if proper claim had been made should be deducted in ascertaining the written down value.

The words used do not leave any doubt about the meaning, and whether or not any hardship has been caused is beside the point.

Also held, that in paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order 1950, the words "of a Part B State" are used to qualify the words in the first part of that paragraph, namely "all depreciation actually allowed under any law or rules of a Part B State relating to income-tax and super tax in the second part of that paragraph. The omission of the words "of a Part B State is not by way of ellipsis, but a deliberate omission with the intention of including laws which could not be stated to be laws of a Part B State, but had been laws in the same area at a time before they formed part of a Part B State.

The Bhavnagar War Profits Act is within the words "any law relating to tax on profits of business" in paragraph 2 of the Removal of Difficulties Order. Hence, the depreciation availed of by the assessees under the Bhavnagar War Profits Act was a deductible amount in computing the written-down value.

Appeals from the Judgment and Order, dated 7th and 8th April, 1960 of the Bombay High Court in Income-tax Reference Nos. 70 and 71 of 1956.

R. J. Kolah, Advocate and Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji & Co., for Appellants.

N. D. Karkhanis and R. N. Sachthley, Advocates, for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—The assessee is the appellant in each of these four appeals arising out of four References under section 66 (1) of the Indian Income-tax Act to the High Court of Bombay. In two of these appeals (C.A. Nos. 599 and 600 of 1962) the assessee who has filed the appeals is the Mahalakshmi Mills, Ltd.; in the other two (C.A. Nos. 601 and 602 of 1962) the Master Silk Mills, Ltd., is the appellant-assessee. Appeals Nos. 599 and 601 are in respect of the assessment year 1949-50; the other two are in respect of assessment year 1951-52. The controversy in all these cases is as regards the computation of written down value in calculating depreciation allowance.

Both the assessees had from before 1949-50 been carrying on business in Bhavnagar which was formerly an Indian State. In 1948 Bhavnagar along with other Indian States of Kathiawar formed themselves into a Union by the name of United States of Kathiawar. Later, the name Kathiawar was changed to Saurashtra. On March 16, 1949 the Raj Pramukh of this newly-formed State instituted the Saurashtra Income-tax Ordinance, 1949. This Ordinance was in force for one year only—the assessment year 1949-50. In assessing the profits of business by the two appellant-companies for the year 1949-50 the Income-tax Officer had therefore to proceed in accordance with the provisions of this Ordinance. For the purpose of calculating the depreciation allowance to which the assessee was entitled in computing the profits or gains of the business the written down value of the building, machinery and plants or furniture had first to be ascertained in accordance with section 13 (5) of the Ordinance which ran thus :—

“Written down value” means :—

“(a) in the case of assets acquired in the previous year, the actual cost to the assessee ;

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Ordinance or allowed under any Act repealed hereby or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past.”

As the assets—of both the assessees—had been acquired before the previous year section 13 (5) (b) applied. Reading the words in the last part of section 13 (5) (b) as equivalent to “which would have been allowable to him if the Indian Income-tax Act, 1922, was in force” the Income-tax Officer, in ascertaining the written down value, deducted depreciation which would have been allowable under the Indian Income-tax Act, 1922, if it had been in force and a claim had been made supported by prescribed particulars. This amount in the case of the Mahalakshmi Mills, Ltd., the appellant in C.A. No. 599/62 was computed as Rs. 17,21,041 and in the case of the Master Silk Mills, Ltd., the appellant in C.A. No. 601/62 was calculated as Rs. 2,02,500. The obvious result of deducting this amount was that the written down value became considerably lower than what it would have been otherwise and so the depreciation allowance became less. The assessee's contention that no deduction should have been made on the strength of the words “which would have been allowed to him if the Indian Income-tax Act, 1922, was in fact in force in the past” as in fact no claim was made or could be made for such allowance, was rejected by the Income-tax Officer. The Appellate Assistant Commissioner as also the Income-tax Tribunal, however, took a different view and held that this expression “or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past” did not permit the Income-tax Officer to make any deduction under this head. The question of law which was referred to the High Court under section 66 (1) of the Indian Income-tax Act on the application of the Commissioner of Income-tax has therefore been framed thus :—

“Whether on the above facts and circumstances of the case and upon a proper construction of the expression “or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past” in section 13 (5) (b) of the Saurashtra Income-tax Ordinance, 1949, the

written down value has to be computed by deduction from the actual cost of depreciation allowance which was allowable under the Indian Income-tax Act, 1922, even though not claimed ? ”

In each of the cases, the High Court answered the question in the affirmative, but gave a certificate that it was a fit case for appeal to the Supreme Court under section 66-A (2) of the Indian Income-tax Act. The present appeals have been filed on the basis of these certificates.

On behalf of the appellants Mr. Kolah has argued that the Ordinance has not used the words “would have been allowable to him” nor the words “would have been allowed to him if a claim supported by prescribed particulars had been made.” and there is no justification for reading these words into the Ordinance. He has stressed the fact that in many cases where the Indian Income-tax Act is in force the assessee might find it to his interest not to make a claim for the depreciation allowance and so no depreciation allowance would then be allowed to him. He concedes that it may be that the intention of the Raj Pramukh in using these words in the Ordinance was that the depreciation which could have been and would have been allowed if a proper claim had been made and substantiated, assuming the Indian Income-tax Act, 1922, was in force in the past, should be deducted in ascertaining the written down value. He contends, however, that the words actually used are not sufficient to express and give effect to this intention. According to him, it was necessary in order to give effect to such an intention that the words “if a claim had been made supported by proper particulars” or at least the words “if a claim had been made” had been used in this clause. In our opinion, the words which according to Mr. Kolah were necessary to give effect to the above intention are implicit in the very language that has been used though they have not been expressly used. The authority which made the Ordinance should be credited with having appreciated the position that no depreciation would have been allowed even if the Indian Income-tax Act, 1922, had been in force, if no claim supported by proper particulars had been made. When therefore the words “which would have been allowed to him” were used, they were used to mean “which should have been allowed if proper claim had been made.” For, it would be meaningless to speak of a depreciation allowance being allowed without a claim. The words used, in our opinion, are apt and sufficient to express the intention that if the Income-tax Act, 1922, which was not in force in the State before, had been in force the depreciation that would have been allowed if proper claim had been made should be deducted in ascertaining the written down value.

Mr. Kolah complains that on this construction the position of the assessee becomes worse than if the Indian Income-tax Act, 1922, had actually been in force in Saurashtra. If that had been the case, only the depreciation actually allowed in the earlier years would have been deductible and so, if no claim had been made and therefore no depreciation had been actually allowed, nothing would be deductible under this head. It does not stand to reason, argued Mr. Kolah, that the position of the assessee should be made worse by this fiction in section 13 (5) (b) of the Ordinance than it would have been if the Act had in fact been in force. It is not unreasonable to think, however, that when making this Ordinance the Raj Pramukh thought that if the Indian Income-tax Act, 1922, had been in force a proper claim would ordinarily have been made and whatever was allowable under that law would have been allowed as depreciation. The words used not only leave no doubt as regards the intention of the authority, but as we have already stated, are apt and sufficient to give effect to that intention.

Mr. Kolah urged that it would cause undue hardship, to the assessee, that without having actually availed of any depreciation he would not be treated as if he had done so. The words used do not, however, leave any doubt about the meaning, and whether or not any hardship has been caused is beside the point.

Neither of the two cases cited by Mr. Kolah in support of his argument is of any assistance. In *Commissioner of Income-tax v. Kamala Mills, Ltd.*¹, the Calcutta High Court decided that the words “actually allowed” in section 10 (5) (b) of the

Indian Income-tax Act as amended by the Income-tax (Amendment) Act (XXIII of 1941) are unambiguous and connote the idea that the allowance was in fact given effect to. The Court rejected a contention of the Income-tax authorities that the expression "actually allowed" means "allowable" under the law in force. In that case, the Court had not to deal with any expression similar to "depreciation which would have been allowed if the Indian Income-tax Act, 1922, was in force". In *Rajaratna Naranbhai Mills, Ltd. v. Commissioner of Income-tax*¹, the Bombay High Court had to construe the words "the amount of depreciation applicable" and held that as the words were not "depreciation allowed" but "depreciation applicable" it was immaterial whether the assessee got any benefit of depreciation in any previous year. Here also, the Court was not called upon to consider the effect of the words under our present consideration, viz., "the depreciation which would have been allowed if the Indian Income-tax Act, 1922, had been in force." Thus, neither of these decisions has any application to the present appeals.

For the reasons we have already given, we are of opinion that the High Court was right in answering the question referred in these cases out of which Civil Appeals Nos. 599 and 601 have arisen, in the affirmative.

For the assessment years 1951-52 the controversy arises in a different way. In 1950, Saurashtra became a Part B State of the Union of India; by section 3 of the Indian Finance Act, 1950, the Indian Income-tax Act was extended to it. In 1951-52 therefore the Indian Income-tax Act, 1922, was in force in Saurashtra in which Bhavnagar was included. So, in calculating the written-down value of assets acquired before the previous year, the Income-tax Officer had to apply the provisions of section 10 (5) (b) of the Indian Income-tax Act, 1922, which runs thus :—

"In the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886 (II of 1886) was in force."

What the Income-tax Officer did was to deduct not only the depreciation allowed in the assessment year 1950-51 under the Indian Income-tax Act but also the depreciation allowed in the assessment year 1949-50 under the Saurashtra Income-tax Ordinance and the depreciation availed of in the previous years by the assessee under the Bhavnagar War Profits Act. There is or can be no dispute that the depreciation allowed in the assessment year 1950-51 was rightly deducted. There might have been a dispute about the depreciation allowed in 1949-50 under the Saurashtra Income-tax Ordinance, but, as before the High Court, the assessee conceded that this amount was also rightly deducted and no controversy on this was raised either before the High Court or before us. The only dispute that remains is whether the depreciation availed of under the Bhavnagar War Profits Act—Rs. 5,93,285 in C.A. No. 600 of 1962 by the Mahalakshmi Mills, Ltd., and Rs. 1,26,707 in C.A. No. 602 of 1962 by the Master Silk Mills, Ltd., was deductible in law. The Appellate Assistant Commissioner agreed with the Income-tax Officer that this was allowable. The Appellate Tribunal, however, took a different view, but on the prayer of the Commissioner of Income-tax referred the following two questions to the High Court under section 66 (1) of the Indian Income-tax Act :—

"1. Whether on the above facts and circumstances of the case and on a correct interpretation of the relevant provisions of section 10 (5) (b) read with the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, paragraph 2 and the Notification No. 19 (S.R.O. 477), dated 9th March, 1953 under section 60-A the written-down value is to be computed after deducting depreciation allowance which could have been claimed under the Indian Income-tax Act, 1922 ?

2. Whether the Notification No. 19 (S.R.O. 477), dated 9th March, 1953 is *ultra vires* of the powers of the Central Government ?"

The High Court has answered the second question in the affirmative, and the correctness of that is no longer in dispute before us.

As regards the first question it appears to us that the matter in controversy between the parties which was actually considered by the High Court is not clearly

1. (1950) 18 I.T.R. 122 : 52 Bom. L.R. 89 ; A.I.R. 1950 Bom. 197,

brought out by the question as framed. Both parties agree that the real question on which the High Court's view was sought and which has been actually considered by the High Court may be expressed thus :—

“Whether on the above facts and circumstances of the case and on a correct interpretation of the relevant provisions of section 10 (5) (b) of the Indian Income-tax Act, 1922 read with the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, paragraph 2 and the Notification No. 19 (S.R.O. 477), dated the 9th March, 1953, under section 60-A the depreciation availed of by the assesseees under the Bhavnagar War Profits Act was a deductible amount in computing the written-down value of the assets.”

It will be noticed that the validity of the notification referred to in the question was the subject-matter of the second question, and the correctness of the High Court's answer that it was invalid, was not questioned before us. What really remained to be considered by the High Court was the effect of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950—to which we shall later refer as the “Removal of Difficulties Order”. The High Court held that the provisions of this paragraph applied to these two cases of assessment for 1951-52, and under them the depreciation already availed of by the assesseees under the Bhavnagar War Profits Act had to be deducted in computing the written-down value. The correctness of this decision is challenged before us in C.A. Nos. 600 and 602 of 1962.

The Removal of Difficulties Order was made by the Central Government on 2nd December, 1950, in exercise of the powers conferred by section 12 of the Finance Act, 1950 and section 5 of the Opium and Revenue Laws (Extension of Application) Act, 1950. We are concerned in the present case only with section 12 of the Finance Act, 1950. That section runs thus :—

“If any difficulty arises in giving effect to the provisions of any of the Acts, rules or orders extended by section 3 or section 11 to any State or merged territory, the Central Government may, by order, make such provision or give such direction as appears to it to be necessary for removing the difficulty.”

Section 3 of the Act had the effect of extending the Indian Income-tax Act, 1922, to Part B States in the Union of India. It was not disputed that it was within the competence of the Central Government to make the Removal of Difficulties Order, 1950, if any difficulty arose in giving effect to the Indian Income-tax Act in an area to which it so became extended. In making the order, the Central Government has expressly said: “That certain difficulties had arisen in giving effect to the provisions of the Indian Income-tax Act, 1922.....in Part B States” and so, the order was made. In *Commissioner of Income-tax v. Dewan Bahadur Ram Gopal Mills, Ltd.*¹, this Court held that it was for the Central Government to determine if any difficulty of the nature indicated in section 12 had arisen and then to make such order or give such direction as appeared to it to be necessary to remove the difficulty. It was in view of this decision that Mr. Kolah conceded that the order was validly made. He contends however that it is only when a difficulty is actually experienced in giving effect to the Indian Income-tax Act that the provision of the Order can come into operation in a particular case. In the cases now under consideration, he argues, no such difficulty was actually experienced and so, paragraph 2 would have no application.

In our opinion, the High Court rightly rejected this contention. The consequence of the Removal of Difficulties Order being validly made under section 12 of the Finance Act, 1950, is that paragraph 2 of the Order (as also the other paragraphs) have to be applied and no exception can be made. Paragraph 2 runs thus :—

“In making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on profits of business shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the proviso to clause (iv) of sub-section (2), and the written-down value under clause (b) of sub-section (5), of section 10, of the said Act.”

These words require “all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on

profits of business" to be taken into account in computing the written-down value under section 10 (5) (b) of the Indian Income-tax Act, irrespective of whether any difficulty has or has not arisen in a particular case in giving effect to the provisions of the Indian Income-tax Act. What is necessary in law is that before an order can be made by the Central Government under section 12, the Central Government must be satisfied that in certain cases difficulties have actually arisen in giving effect to the provisions of the Indian Income-tax Act. Once on such satisfaction an order is made it is not again necessary for the application of the order in a particular case that difficulty must be found to have arisen. A separate order under section 12 has not got to be made for each particular case. The order once made on the satisfaction of the Central Government that in some cases difficulties have arisen in giving effect to the provisions of the Indian Income-tax Act the order operates under its own terms and so in giving effect to the order it is not necessary for the Income-tax Officer to see first whether any difficulty has arisen.

We are of opinion that whether any difficulty did actually arise in the cases now under consideration in applying the Indian Income-tax Act, 1922, in this Part B State or not, paragraph 2 of the Removal of Difficulties Order must be applied according to its terms. It is therefore not necessary to examine whether any such difficulty did arise in these cases.

This brings us to Mr. Kolah's main contention that the Bhavnagar War Profits Act is not one of the laws depreciation allowed under which has to be deducted under paragraph 2 of this Order. He points out that the Bhavnagar War Profits Act had ceased to be in force long before the Part B State—the United States of Saurashtra—came into existence. It was therefore never a law of Part B State and so depreciation which the assessee availed of under it will not come within the words "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax". This appears to be correct; but the question still remains whether the Bhavnagar War Profits Act is covered by the words "any law relating to tax on profits of business" in the paragraph. If it does, the depreciation which the assessee availed of under the Act has to be deducted in computing the written down value. Analysing the clause: "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on profits on business," we notice that the words "of a Part B State" were used to qualify the phrase "any laws or rules" in the first portion of the clause. Similar words were not used to qualify the words "any law" in the second part. According to Mr. Kolah these words "of a Part B State" were intended to be read also after the words "any law" in the latter portion and were omitted by way of ellipsis so that the sentence might not appear cumbersome. Ellipsis is a well-known figure of speech by which words needed to complete the construction or sense are omitted to produce better rhythm or balance in the structure of the sentence.

After careful consideration we have however come to the conclusion that the omission of the words "of a Part B State" in this paragraph is not by way of ellipsis but a deliberate omission with the intention of including laws which could not be stated to be laws of a Part B State but had been laws in the same area at a time before they formed part of a Part B State. If the omission had been by way of ellipsis, as argued by Mr. Kolah, it would be reasonable to think that the words "any law relating to tax" would also have been omitted, and this part of the paragraph would have read as "all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or tax on profits of business". It also appears to us that if the intention had not been to include the depreciation allowed under a law which had been law in a component part of the Part B State before it became included in the Part B State, it was unnecessary to add the words "or any law relating to tax on profits of business". For, "a law relating to tax on profits of business" is also a law relating to income-tax and, so, depreciation actually allowed under a law relating to tax on profits of business which was law of a Part B State would come within the first portion of the clause. It is worth noticing in this connection that in 1949 when by an Ordinance certain taxation laws were extended

to Merged States the Central Government made under section 8 of that Ordinance "The Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949". Paragraph 2 of that Order merely said

"all depreciation actually allowed under any laws or rules of a merged State relating to income-tax and super-tax shall be taken into account".

Nothing was said in that Order as regards "any law relating to tax on profits of business". The Removal of Difficulties Order add the words "any law relating to tax on profits of business". This appears to have been done with the deliberate intention of including depreciation allowed under such laws, even though they were not laws "of a Part B State" but of a component State.

We have come to the conclusion that the Bhavnagar War Profits Act is within the words "any law relating to tax on profits of business" in paragraph 2 of the Removal of Difficulties Order. We hold that the High Court has rightly decided that the depreciation availed of by the assessee under the Bhavnagar War Profits Act was a deductible amount in computing the written down value of the assets.

All the appeals are therefore dismissed with costs. There will be one set of hearing fee in all the appeals.

V.B.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—S. K. DAS, A. K. SARKAR, K. C. DAS GUPTA AND N. RAJA-GOPALA AYYANGAR, JJ.

Seth Kalekhan Mohammad Hanif

*Appellant**

v.

The Commissioner of Income-tax

Respondent.

Income-tax Act (XI of 1922), sections 33, 34 and 66—Cash credit—Proof of source—Onus on assessee—Original assessment by estimate—Supplementary assessment adding cash credit—Whether amounts to double taxation—Income from undisclosed source—Undisclosed income from disclosed source—Distinction between—Section 66—Case stated—"Whether Tribunal's inference is one of law or fact?"—Question, whether can be referred to High Court.

The assessee, a trader carrying on business in general merchandise and bidis had submitted a return for the assessment years 1945-46 and 1947-48. As his accounts were not found complete and reliable, the Officer had assessed the gross profits of the businesses on the basis of certain percentages of the total sales which had also to be fixed by estimates. Subsequently the Officer, while dealing with the assessment for the year 1948-49, noticed various credit entries in the assessee's books of account which had all escaped his attention at the time of the assessment for the years 1945-46 and 1947-48. The assessments were re-opened in respect of these years and after the assessee was given an opportunity to explain the entries, the Officer added to the previously estimated incomes a sum of Rs. 95,000 in respect of 1945-46 and a sum of Rs. 39,575 in respect of 1947-48. This was confirmed in the appeal. The Appellate Tribunal gave the assessee relief in regard to some amounts, but otherwise maintained the order of the Officer. There was a Reference to the High Court under section 66 (2) of the Act and against the answers to the questions referred the assessee appealed to the Supreme Court by Special Leave. The points for determination were (1) whether the burden of proving the source of the cash credits is on the assessee, (2) whether the inference of the Tribunal that these credits are the assessee's income from some undisclosed sources is an inference of fact or inference of law and (3) whether the Officer having already assessed the income on the percentage basis, is justified in treating the credits as profits from an undisclosed source.

Held, the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Officer is entitled to treat it as taxable income.

The taxing authorities are not precluded from treating the amounts of the credit entries as income from undisclosed sources simply because the entries appear in the books of a business whose income they had previously computed on a percentage basis.

If the income is treated as one from an undisclosed source, it is not treated as income of the disclosed source which had previously been assessed to tax, and there is in such a case no double taxation.

It is not a case where the income sought to be taxed was held to be undisclosed income from a disclosed source, the income of which source had previously been taxed on the basis of an estimate. If it were so, the question of double taxation might have been legitimately raised.

“ Question whether the inference drawn by the Tribunal is one of law or fact, is not a question which arises out of the decision of the Tribunal. A question in this form cannot be referred under section 66 of the Indian Income-tax Act, 1922.

Appeal by Special Leave from the Judgment and Order of the Madhya Pradesh High Court dated September 9, 1957, in Miscellaneous Civil Cases Nos. 42 and 43 of 1955.

A. V. Viswanatha Sastri, Senior Advocate (*Rameshwar Nath*, *S. N. Andley* and *P. L. Vohra* of *Rajinder Narain & Co.*, with him), for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (*Gopal Singh* and *R. N. Sachthey* with him), for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—These are two appeals arising out of two assessment orders made under the Income-tax Act, 1922, respectively for the years 1945-46 and 1947-48. In each assessment case there was a Reference of certain questions to the High Court of Madhya Pradesh under section 66 of the Act and the present appeals are against the High Court's answers to these questions.

The assessee is a trader carrying on two businesses, namely, manihari (general merchandise) and bidis. He had also certain income from property but with this income we are not concerned in these appeals. For each of the assessment years concerned, the assessee had submitted a return but as his accounts were not found complete and reliable, the Income-tax Officer had assessed the gross profits of the businesses on the basis of certain percentages of the total sales which had also to be fixed by estimates. No question arises in these appeals as to the correctness of those assessments.

Subsequently while dealing with the assessment for the year 1948-49, the Income-tax Officer noticed various credit entries in the assessee's books of account which had all escaped his attention at the time of the assessment for the years 1945-46 and 1947-48 earlier mentioned. These entries were as follows :—

1945-46.		Rs.
(i) Gold Khata	..	41,300
(ii) Ghar Khata	..	33,000
(iii) Mohamad Islam Khata	..	10,000
(iv) Muslim Bi Khata	..	11,000
Total	..	95,300
1947-48.		Rs.
(i) Ghar Khata credit under sale of ornaments	..	19,575
(ii) Yakub Manihar account loan from Yakub Manihar	..	20,000
Total	..	39,575

The Income-tax Officer thereupon, with the sanction of the Commissioner of Income-tax, re-opened the assessments in respect of these years and after giving the assessee full opportunity to explain the nature of these entries, made fresh assessments under section 34. In the fresh assessments he added to the previously estimated incomes the said sum of Rs. 95,000 in respect of the year 1945-46 and the said sum of Rs. 39,575 in respect of the year 1947-48, as he was unable to accept the explanation offered by the assessee in support of his contention that the credit entries did not represent income.

The assessee appealed against these fresh assessments to the Appellate Assistant Commissioner but the Appeals were unsuccessful. He then appealed to the Income-tax Tribunal. The Tribunal found the assessee's explanation with regard to the said entries for the amounts of Rs. 3,000 and Rs. 10,000 under the heads Ghar Khata and Mohammad Islam Khata respectively, acceptable and ordered their deletion from the assessment for the year 1945-46, but otherwise maintained the orders of the Income-tax Officer. Thereafter, under the orders of the High Court under section 66 (2) of the Act made at the instance of the assessee, the Tribunal framed six questions in each of the assessment cases and referred them to the High Court for its decision. The questions framed were identical in the two cases excepting as to one minor matter in Question No. 6 which made no difference and the References in the two cases were heard together. These questions were answered by the High Court against the assessee and hence the present appeals by the assessee.

As we have said, there were six questions in each case which were for all practical purposes in identical terms and the questions in the two cases, therefore, need not be discussed separately. Of these six questions it is unnecessary to deal with the first three for two of these had been abandoned in the High Court and the High Court's answer to the third was not challenged in this Court.

The first question that arises for discussion is Question No. 4 which was in these terms :

"Whether the burden of proving the source of the cash credits is on the assessee ?"

It seems to us that the answer to this question must be in the affirmative and that is how it was answered by the High Court. It is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Income-tax Officer is entitled to treat it as taxable income. See *A. Govindarajulu Mudaliar v. Commissioner of Income-tax, Hyderabad*¹.

We come now to Question No. 5 which is as follows :

"If so, then whether in the absence of satisfactory proof as to the source of credits the inference of the Tribunal that these credits are the assessee's income from some undisclosed sources is an inference of fact or an inference of law ?"

We confess we find it difficult to see the point of this question. Questions can be referred under section 66 of the Act when they are questions of law which arise out of the facts found by the Tribunal and which the Tribunal is said to have answered erroneously, thereby unlawfully imposing a burden of tax on an assessee. On questions of fact, the Tribunal is the final authority, and such questions cannot be referred to a High Court for its decision. Now the present question assumes that the Tribunal has made an inference. Either that inference is one of fact or it is one of law. If it is of fact, no question with regard to it can be referred to the High Court. If it is one of law, then a question whether the inference could in law be drawn might be referred to the High Court. But the question whether the inference drawn by the Tribunal is one of law or fact, which is the question here framed, is not a question which arises out of the decision of the Tribunal nor one which the Tribunal has at all answered. It does not seem to us that a question in this form can be referred under section 66. The High Court, however, answered the question by saying that the inference was one of fact. If this is the correct view, then the matter ends there, for, as we have said, on questions of fact the Tribunal is the final authority. If, on the other hand, the inference is one of law, then a question may have been referred to the High Court as to whether the inference was justified in law. That was not done. We may, however, add that if the inference is treated as one of law, in our view, the Tribunal had drawn it lawfully and this view would receive support from *A. Govindarajulu Mudaliar's Case*¹.

We have now to deal with the last Question, question No. 6, which as framed in the case for the assessment year 1945-46 is set out below :

“ Whether having regard to the fact that the Income-tax Officer has assessed the Income on a percentage basis, he was justified in treating the said sums of Rs. 41,300 and Rs. 11,000 as profits from an undisclosed source ? ”

In the case for the assessment year 1947-48 the corresponding question was in identical terms, except that the figures mentioned in it were Rs. 19,575 and Rs. 20,000. The High Court answered the question in the affirmative and in our view rightly, for we do not think that any other answer is possible.

We are in some difficulty in appreciating the point of this question also. The question would seem to suggest that because the income from a disclosed source has been computed on the basis of an estimate and not on the basis of the return filed in respect of it, an income represented by a credit entry in the books of account of that source cannot be held to be income from another, and undisclosed, source. We do not see why it cannot be so held. It appears from the judgment of the High Court that the reason given in support of the suggestion was that if that income was held to be income of an undisclosed source, the result would be double taxation of the same income which the Income-tax Act does not contemplate. Apparently it was said that there would be double taxation because it was assumed that the same income had once been earlier taxed on the basis of an estimate. This reason is obviously fallacious, for if the income is treated as one from an undisclosed source which the question postulates, it is not treated as income of the disclosed source which had previously been assessed to tax and, therefore, there is in such a case no double taxation. It is not a case where the income sought to be taxed was held to be undisclosed income of a disclosed source, the income of which source had previously been taxed on the basis of an estimate. If it were so, the question of double taxation might have been legitimately raised. That, however, is clearly not the case here as the question as framed itself shows.

We concede that the question as to the source from which a particular income is derived is one which has to be decided on all the facts of the case. Hence, the question whether income represented by an entry in the books of a business is income of that business or of another business would have to be decided on the facts which showed the business to which it belonged. But quite clearly the answer to that question would not depend on whether the income from the first mentioned business had been computed on the basis of a return filed or of an estimate of the income made by the taxing authorities. This, however, is what the question as framed suggests, and that suggestion is, in our view, wholly without foundation. Therefore, it cannot be said that the taxing authorities were precluded from treating the amounts of the credit entries as income from undisclosed sources simply because the entries appear in the books of a business whose income they had previously computed on a percentage basis. That is why we think that the answer to the question as framed must be in the affirmative.

As we have earlier said, the question as to the source from which a particular income is derived has to be decided on all the facts of the case. In the present case, the Income-tax Officer held the income represented by the credit entries to be income from undisclosed sources, that is, neither from the manihari (general merchandise) nor from the bidi business of the assessee which he had disclosed. This view was upheld by the Appellate Commissioner and by the Tribunal excepting as to two of the amounts earlier mentioned. It was open to the assessee to raise the question that the finding that those amounts were income received from undisclosed sources was not based on any evidence or was, for other reasons, perverse. It appears that he did raise some questions of this type before the Tribunal for Reference to the High Court, but the Tribunal did not think that those questions legitimately arose and did not refer them to the High Court. The assessee accepted the decision of the Tribunal, and did not move the High Court to direct a Reference in regard to these questions under section 66 (2). Those questions, therefore, cannot be raised in this

Court, we have dealt with the reference made on the basis that the finding that the amounts of the credit entries were income received from undisclosed sources was disputed only on the ground that the income from the business had been computed on the basis of an estimate. In the circumstances of the case, we could not have done anything else.

These appeals fail and are dismissed with costs. There will be one set of hearing fees.

V.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND N. RAJAGOPALA AYYANGAR, JJ.

The State of Punjab

.. *Appellant**

v.

Mst. Qaisar Jehan Begum and another

.. *Respondents.*

Land Acquisition Act (I of 1894), section 18, Proviso (b)—“Six months from the date of the Collector’s award”—Construction—Civil Court on a Reference under section 18, if can go, into question whether application for Reference was barred by limitation.

A literal and mechanical construction of the words “six months from the date of the Collector’s award” occurring in the second part of clause (b) of the Proviso to section 18 of the Land Acquisition Act would not be appropriate and the knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice, the expression used in the Proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively, and the period of six months (within which an application for making a Reference to a Civil Court) will run from the date of that knowledge. Knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents must be known either actually or constructively. If the award is communicated to the party under section 12 (2) of the Land Acquisition Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly if a party is present in Court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. An application for a Reference made six months from the date of knowledge of the award is not barred by time within the meaning of the second part of clause (b) of the Proviso to section 18 of the Land Acquisition Act.

[Conflict of judicial opinion on the question whether a Civil Court, on a Reference under section 18 of the Land Acquisition Act can go into the question of limitation was left unresolved.]

Appeal by Special Leave from the Judgment and Order dated the 16th November 1959 of the Punjab High Court in Civil Revision No. 268 of 1958.

R. Ganapathy Iyer and R.N. Sachthey, Advocates, for Appellant.

S.P. Sinha, Senior, Advocate (*Shaukat Hussain*, Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

S.K. Das, J.—This is an appeal by Special Leave from the judgment and order dated 16th November, 1959 passed by the Punjab High Court on an application in Revision in respect of an order dated 17th December, 1957 by which the learned Senior Subordinate Judge of Gurgaon held that a Reference by the Collector of Gurgaon under section 18 of the Land Acquisition Act (I of 1894) was incompetent by reason of the circumstance that it was made on an application filed beyond time. The appellant before us is the State of Punjab and the respondents are two ladies being related as mother and daughter. We shall presently state the relevant facts, but before we do so it is necessary to say that the only point on which the High Court disposed of the application in Revision before it made by the respondents herein, was whether the Civil Court to which a Reference is made by the Collector under section 18 of the Land Acquisition Act on an application filed beyond time, can reject the Reference on the ground that the Reference made is incompetent. On this point there is a conflict of judicial opinion. In disposing of the application in Revision the learned single Judge who heard it proceeded on the basis that

he was bound by the Division Bench decision of the same High Court in *Hari Krishan Khosla v. State of Pepsu*¹, which held that the jurisdiction of the Civil Court on a Reference under section 18 was confined to considering and pronouncing upon any of the four different objections to an award under the Act which might have been raised in the written application for the Reference and the Civil Court had no jurisdiction to decide the question of limitation. Therefore, the learned single Judge did not go into the further question as to whether the application made for a Reference in the present case was filed beyond time or not as prescribed by the Proviso to section 18 of the Act. That question has however been agitated before us by reason of the decision in *Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer and another*², a decision of this Court which was not available at the time when the learned single Judge of the Punjab High Court disposed of the application in Revision.

We proceed now to state the relevant facts. The respondents who were evacuees were owners of 55 *bighas* and 7 *biswas* of land in two villages known as Salarpur and Nasirpur in the district of Gurgaon. Their lands in the aforesaid two villages along with lands of other persons in other villages were acquired by the appellant for use as a Field Firing and Bombing Range. The respondents were not notified about the acquisition and were not present at the time of the award. The respondents alleged, and this was not denied, that the Collector treated the property as evacuee property and none of the notices contemplated by the Land Acquisition Act, 1894 were issued to them. The Collector made an award on 25th October, 1953, by which he allowed compensation at the rate of Rs. 96 per acre in respect of the lands of the respondents. On 25th December, 1954, that is more than a year after the award, the respondents made an application to the Collector in which they said that certain agricultural lands of villages Salarpur and Nasirpur were compulsorily acquired by the Collector by an award dated 30th October, 1953 (October 30 was presumably a mistake for October 25), but they were not given any notice of the acquisition proceedings. The respondents further stated that the award had fixed the compensation to be given to the land owners affected by the acquisition, but the amount to be paid to each owner was not apportioned therein. The respondents then referred to a judgment and decree of the Lahore High Court dated 13th November, 1944, under which they were held to be the owners of the lands in question. A prayer was made on behalf of the respondents for payment of the compensation money at an early date for the purpose of defraying the expenses of a daughter's marriage, but without prejudice to the claim of the respondents for enhancement of the amount of compensation. The amount of compensation appears to have been paid on 22nd July, 1955 and on 30th September 1955, the respondents made an application to the Collector for a Reference under section 18 of the Act. In this application the respondents stated that they knew about the award on 22nd July, 1955, when they received the compensation amount and therefore the petition was within time. The principal objection which they raised to the award was that the market value of the land was not Rs. 96 per acre as given in the award, but about Rs. 600 per acre. The Collector accepted this application in a very short order which stated.

"Public Prosecutor has been heard. Mst. Timur Jehan Begum has filed an affidavit to the effect that she had no knowledge of the award at the time it was made and that she only came to know about it in July, 1955, when she received the award money. Nothing has been shown to me to the contrary to prove that the award was made within the knowledge of the petitioners. Under the circumstances it would be only fair and equitable to refer the petition under section 18 of the Land Acquisition Act to a Civil Court for determining the compensation, which I hereby do."

A Reference was made accordingly to the Civil Court and the Senior Subordinate Judge of Gurgaon who heard it came to the conclusion that the application made to the Collector for a Reference was barred by time, because the Collector's award was made on 25th October, 1953 and the application for a Reference

1. A.I.R. 1958 Punj. 490.

S.C.R. 676.

2. (1962) 1 S.C.J. 696 : (1962) 2 M.L.J. (S.C.) 10 : (1962) 2 An. W.R. (S.C.) 10 : (1962) 1

was made on 30th September, 1955. The learned Subordinate Judge expressed some doubt as to whether the respondents were entitled to count the period of limitation from the date of knowledge but he held that even if they were entitled to do so, their date of knowledge must be taken to be 24th December, 1954, on which date they made an application for interim payment and the application for Reference having been made more than six months from the date of knowledge, the application was barred by time within the meaning of the Proviso to section 18 of the Act. As to whether it was open to the Civil Court to go into the question of limitation the learned Subordinate Judge referred to the conflict of judicial opinion and said that the preponderance of opinion was in favour of the view that the Civil Court could go into the question in order to find out whether the Reference was competent or not. In this view of the matter, the learned Subordinate Judge discharged the Reference on the ground that it was incompetent. It may be mentioned here that the Division Bench decision of the Punjab High Court in *Hari Krishan Khosla's case*¹ was not available to the learned Subordinate Judge on the day he passed his orders. The matter was then taken to the High Court on an application in Revision by the respondents and we have already stated that the High Court dealt with it on the footing of the decision in *Hari Krishan Khosla's case*¹. The High Court accepted the application in Revision, set aside the order of the learned Subordinate Judge and directed him to deal with the Reference on merits. It is from this order of the High Court that the appeal has come to us by Special Leave.

It is necessary at this stage to set out the Proviso to section 18 of the Act :

"....."

Provided that every such application shall be made,—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award ;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

Assuming that the appellant can raise the ground of limitation, the first question before us is, whether the application made on 30th September, 1955, was within time within the meaning of the aforesaid Proviso. Clause (a) of the Proviso is clearly not applicable in the present case, because admittedly the respondents were neither present nor were represented before the Collector when the latter made his award. The first part of clause (b) is also not applicable, because the respondents did not receive any notice from the Collector under sub-section (2) of section 12 of the Act. That sub-section requires the Collector to give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made. Clearly enough, the respondents herein were entitled to a notice under sub-section (2) of section 12 but admittedly no notice was issued to them.

As to the second part of clause (b) of the Proviso, the true scope and effect thereof was considered by this Court in *Raja Harish Chandra's case*². It was there observed that a literal and mechanical construction of the words "six months from the date of the Collector's award" occurring in the second part of clause (b) of the Proviso would not be appropriate and

"the knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice, the expression...used in the Proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively."

Admittedly the award was never communicated to the respondents. Therefore the question before us boils down to this. When did the respondents know the award either actually or constructively? Learned counsel for the appellant has placed

1. A.I.R. 1958 Punj. 490.

10 : (1962) 2 An.W.R. (S.C.) 10 : (1962.

2. (1962) 1 S.C.J. 696 : (1962) 2 M.L.J. (S.C.) 1 S.C.R. 676.

very strong reliance on the petition which the respondents made for interim payment of compensation on 24th December, 1954. He has pointed out that the learned Subordinate Judge relied on this petition as showing the respondents' date of knowledge and there are no reasons why we should take a different view. It seems clear to us that the ratio of the decision in *Raja Harish Chandra's case*¹ is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents to the award. These contents may be known either actually or constructively. If the award is communicated to a party under section 12 (2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in Court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award. Looked at from that point of view, we do not think that it can be inferred from the petition, dated 24th December, 1954, that the respondents had knowledge of the award. One of the respondents gave evidence before the learned Subordinate Judge and she said :

"The application marked as Exhibit D-1 was given by me but the amount of compensation was not known to me, nor did I know about acquisition of the land. Chaudhari Mohd. Sadiq, my Karinda had told me on the day I filed the said application that the land had been acquired by the Government."

This evidence was not seriously contradicted on behalf of the appellant and the learned Subordinate Judge did not reject it. It is worthy of note that before the Collector also the appellant did not seriously challenge the statement of the respondents that they came to know of the award on 22nd July, 1955, the date on which the compensation was paid. On the reply which the appellant filed before the learned Subordinate Judge there was no contradiction of the averment that the respondents had come to know of the award on 22nd July, 1955. That being the position we have come to the conclusion that the date of knowledge in this case was 22nd July, 1955. The application for a Reference was clearly made within six months from that date and was not therefore barred by time within the meaning of the second part of clause (b) of the Proviso to section 18 of the Act.

In the view which we have taken on the question of limitation, it is unnecessary for us to decide the other question as to whether the Civil Court, on a Reference under section 18 of the Act, can go into the question of limitation. We have already stated that there is a conflict of judicial opinion on that question. There is on one side a line of decisions following the decision of the Bombay High Court in *In re Land Acquisition Act*² which have held that the Civil Court is not debarred from satisfying itself that the Reference which it is called upon to hear is a valid Reference. There is, on the other side, a line of decisions which say that the jurisdiction of the Civil Court is confined to considering and pronouncing upon any one of the four different objections to an award under the Act which may have been raised in the written application for the Reference. The decision of the Allahabad High Court in *Secretary of State v. Bhagwan Prasad*³ is typical of this line of decisions. There is thus a marked conflict of judicial opinion on the question. This conflict, we think, must be resolved in a more appropriate case on a future occasion. In the case before us the question does not really arise and is merely academic and we prefer not to decide the question in the present case.

For the reasons given above, we would dismiss the appeal with costs.

K.S.

Appeal dismissed.

1. (1962) 1 S.C.J. 696 : (1962) 2 M.L.J. (S.C.) 10 : (1962) 2 An.W.R. (S.C.) 10 : (1962) 1 S.C. R. 676

2. (1905) I L.R. 30 Bom. 275.
3. (1929) I.L.R. 52 All. 96.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA AND J. C. SHAH, JJ.

K. Venkataramiah

v.

A. Seetharama Reddy and others

.. Appellant*

.. Respondents.

Civil Procedure Code (V of 1908), Order 41, rule 27—Scope—Provision for recording reasons for allowing additional evidence—If mandatory—Omission to record reasons—If vitiates such admission of evidence.

Clearly the object of the provision (rule 27 (2) of Order 41 of the Code of Civil Procedure) is to keep a clear record of what weighed with the appellate Court in allowing the additional evidence to be produced—whether this was done on the ground (i) that the Court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal, or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate Court such recording of the reasons is necessary and useful also to the Court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the Court below. The provision for recording reasons is directory and not mandatory even though the word “shall” is used in rule 27 (2). The omission to record reasons for allowing additional evidence does not vitiate such admission.

There may well be cases where even though the Court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence, “to enable it to pronounce judgment” it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence “for any other substantial cause” under rule 27 (1) (b) of Order 41.

The “requirement” was the requirement of the High Court hearing the appeal, and the Supreme Court will not examine the evidence to find out whether it would have required such additional evidence to enable it to pronounce judgment.

Appeal by Special Leave from the Judgment and Decree dated 5th September, 1961 of the Andhra Pradesh High Court in Special Appeal No. 3 of 1961.

K. Bhimasankaram and *A. Ranganadham Chetty*, Senior Advocates, (*A. Vedavalli*, *E. Udayarathnam* and *A. V. Rangam*, Advocates, with them), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (*R. Thiagarajan*, Advocate, with him), for Respondent No. 1.

V. G. Prashar, *Amar Singh Chaturvedi*, and *K. R. Chaudhri*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Das Gupta, J.—This is an appeal against a judgment and order of the High Court of Andhra Pradesh confirming an order of the Election Tribunal, Hyderabad by which the Tribunal dismissed an election petition filed by the present appellant. By that petition this appellant sought a declaration that the election of three persons, the present respondent, Seetharam Reddy, one Anandam and M. Ataur Rahman be declared void and that he, the petitioner be declared as duly elected to the Legislative Council of the Andhra Pradesh from Telangana Graduates Constituency. In this appeal we are no longer concerned with the question of validity of elections of Mr. Anandam or Mr. M. Ataur Rahman but only with that of the respondent Seetharam Reddy.

The appellant challenges the decision of the High Court mainly on the ground that in reaching its conclusion on the vital question of the age of Seetharam Reddy on the date of election the High Court took into consideration evidence which was not legally available for such consideration.

Though a large number of objections were raised in the petition to contest the validity of Seetharam Reddy's election, only four of them were ultimately pressed before the Election Tribunal, *viz.*, (1) That Seetharam Reddy was disqualified to be chosen to fill a seat in the Legislative Council under Article 173 (b) of the Constitution his age being below 30 years on the relevant date ; (2) That the election was

vitiated by undue influence exercised on the voters by some Ministers of the State of Andhra Pradesh ; (3) That the secrecy of the ballot was not maintained, and (4) That the election was void on account of improper deletion of names of voters in the final list.

All these objections were rejected by the Election Tribunal which accordingly dismissed the petition. On appeal, the High Court confirmed the findings of the Election Tribunal on all these points and dismissed the appeal.

Faced with the position that the correctness of these findings which are all findings of facts is not open to challenge before this Court in this appeal by Special Leave, the appellant has raised the contention that the High Court's decision on the question of age of Seetharam Reddy was vitiated by the error of law in that additional evidence was admitted and considered by the High Court without complying with the provisions of law.

It appears that a considerable amount of oral and documentary evidence was adduced before the Tribunal on this question of Seetharam Reddy's age. While the petitioner tried to establish that Seetharam Reddy was born in October, 1931, Seetharam Reddy tried to establish that he was born sometime in 1928. The Tribunal rejected as unworthy of credit the oral testimony adduced by either side. It also rejected most of the documentary evidence, including Exhibit R-5 and Exhibit R-6, R-11 and R-12. R-5 is a birth register; R-6 is an entry therein, R-11 is a certificate purporting to be issued by the Headmaster of the Muslim High School, Kurnool, in respect of the age of the respondent Seetharam Reddy while R-12 is an application said to have been made at the time of his admission to this school. The Tribunal's finding was that Seetharam Reddy did not study in the Kurnool Muslim High School. The Tribunal also rejected the documentary evidence produced on behalf of the petitioner seeking to show that the respondent Seetharam Reddy was born on the 10th October, 1931. Ultimately, however, the Tribunal decided the issue as regards the age against the petitioner on the basis of certain documents in connection with the proceedings before the Judicial Committee of the Privy Council which showed that the respondent Seetharam Reddy was a major by the year 1356 Fasli. It appears that in that year an appeal was pending in the Judicial Committee of the Privy Council which had arisen out of a suit regarding the adoption of Seetharam Reddy by one Tulsamma, and the party who contested the alleged adoption filed a petition to declare him (Seetharam Reddy) as a major. Exhibit R-10 is that petition. After notice was served a power (vakalatnama) was filed by Seetharam Reddy as a major in the appeal. In this vakalatnama (Exhibit R-3) Seetharam Reddy's age was given as 19 years. Exhibit R-13 was the notice issued to Seetharam Reddy in those proceedings.

The Tribunal was of opinion that the genuineness of these documents, Exhibits R-3, R-10 and R-13 could not be questioned and it was clear that the respondent was treated as a major in the proceedings before the Judicial Committee from and after 1356 fasli. That showed, according to the Tribunal, that he was not less than 30 years of age on the date of election or nomination.

The High Court also came to the same conclusion on this issue as regards Seetharam Reddy's age. In coming to this conclusion it has relied not only on the vakalatnama Exhibit R-3 mentioned above but also on four other documents, viz., Exhibits R-5 and R-6, which the Tribunal rejected as unreliable and Exhibits R-19 and R-20 which were not tendered in evidence before the Tribunal but came before the High Court as additional evidence. The appellant contends that the High Court acted without jurisdiction in admitting additional evidence.

We are clearly of opinion that even if it was found that the High Court erred in taking the additional evidence that would not be a case of lack of jurisdiction but would be an error in the exercise of jurisdiction. As was pointed out however by this Court in *Arjan Singh v. Kartar Singh and others*.¹

1. (1951) S.C.J. 274; (1951) 1 M.L.J. 556; (1951) S.C.R. 258.

"The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order 41, rule 27, of the Code of Civil Procedure."

The question whether in the present case the High Court exercised the discretion judicially has therefore to be examined by us.

Section 107 of the Code of Civil Procedure empowers the appellate Court "to take additional evidence or to require such evidence to be taken," "subject to such conditions and limitations as may be prescribed." Rule 27 of Order 41 of the Code of Civil Procedure prescribes the conditions and limitations in the matter. The rule first lays down that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. It then proceeds to lay down two classes of cases where the appellate Court may allow additional evidence to be produced. One class is where the Court appealed from has refused to admit evidence which ought to have been admitted. The other class is where the appellate Court requires such additional evidence for itself—either to enable it to pronounce judgment or for any other substantial cause. The second clause of the rule requires that when additional evidence is allowed to be produced by an appellate Court the Court shall record the reason for its admission.

The additional evidence that was produced in this case had not been tendered in evidence before the Election Tribunal and so this case does not fall within the first class mentioned above. Obviously, therefore, the High Court allowed the production of this evidence on its own requirement.

It is contended before us on behalf of the appellant that the learned Judges made the order mechanically without applying their minds to the requirements of Order 41, rule 27 of the Code of Civil Procedure. Support for this contention is sought from the fact that the High Court did not record its reasons for the admission of the additional evidence as required by the second clause of the rule. The importance of this provision for recording of the reasons for admission of additional evidence has been emphasised in several cases (*vide Sreemanchunder v. Gopalchunder*¹; *Manmohar v. Mst. Ramdei*²).

It is very much to be desired that the Courts of appeal should not overlook the provisions of clause (2) of the Rule and should record their reasons for admitting additional evidence. We are not prepared, however, to accept the contention of the appellant that the omission to record the reason vitiates the admission of the evidence. Clearly, the object of the provision is to keep a clear record of what weighed with the appellate Court in allowing the additional evidence to be produced—whether this was done on the ground (i) that the Court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal, or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate Court such recording of the reasons is necessary and useful also to the Court of further appeal for deciding whether the discretion under the Rule has been judicially exercised by the Court below. The omission to record the reason must therefore be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory. For, it does not seem reasonable to think that the Legislature intended that even though in the circumstances of a particular case it could be definitely ascertained from the record why the appellate Court allowed additional evidence and it is clear that the power was properly exercised within the limitation imposed by the first clause of the Rule all that should be set at naught merely because the provision in the second clause was not complied with. It may be mentioned that as early as 1885 when considering a similar provision in the corresponding section of the Code of 1882, *viz.*, section 586, the High Court of Calcutta held that this provision for recording reasons is merely directory and not imperative *Gopal Singh v. Jhakri Rai*³. We are aware of no case in which

1. (1866) 11 M.I.A. 28.
2. 35 C.W.N. 925.

3. I.L.R. 12 Cal. 37.

the correctness of this view has been doubted. It is worth noticing that when the 1908 Code was framed and Order 41, rule 27 took the place of the old section 568, the Legislature was content to leave the provision as it was and did not think it necessary to say anything to make the requirement of recording reasons imperative. It is true that the word "shall" is used in rule 27 (2) ; but that by itself does not make it mandatory. We are therefore of opinion that the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission.

Nor are we prepared to agree with the learned Counsel that this omission justifies the conclusion that the High Court acted mechanically in the matter, without applying its mind to the requirements of the Rule. The record before us shows that the hearing of the appeal before the High Court commenced on the 18th July, 1961, and after the appellant's Counsel had concluded his arguments the respondent's Counsel started addressing the Court. He continued his arguments on the next date, i.e., the 19th July. On the next date, i.e., the 20th July, 1961, an application was made on behalf of the respondent, Seetharam Reddy, praying that two registers of admission and withdrawals of the Government Muslim High School, Kurnool, be received and admitted as additional evidence in the appeal. (It may be stated that the petition itself bears the date, 18th July, but the supporting affidavit bears the date 20th of July). It was stated on affidavit that both these registers had been summoned along with the other documents by the appellant, Venkataramiah, and were actually produced before the Election Tribunal by the Headmaster and further that these had been transmitted to the High Court along with the records of the case. It was stated that these documents had "an important bearing" upon the case and were "required to be looked into" to arrive at a just and correct conclusion in regard to Issue No. 1. On the following date, i.e., the 21st of July the appellant Venkataramiah put in his counter affidavit objecting to the respondent's prayer and in Para. 6 of this counter affidavit we find the following statement :—

"In the circumstances it is submitted that the provisions of Order 41, rule 27, Civil Procedure Code are not complied with. It was not offered as evidence before the Tribunal. Admittedly it was available at the time of the trial and it is not the case of the petitioner that notwithstanding exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decision was pronounced by the Tribunal. It is not in the interest of justice nor is it necessary to enable this Court to pronounce judgment to admit them as additional evidence. On the other hand, the admission of the registers as evidence would enable the party to go behind his case stated by him in his counter affidavit before the Election Tribunal and set up altogether an inconsistent case. Hence the said Admission Registers are neither relevant nor material."

The High Court passed the order for the taking of additional evidence on the same date. How the High Court considered the matter is best shown by a passage from the judgment pronounced by the Court in the appeal. After pointing out that the Tribunal

"was not prepared to place any reliance on Exhibits R-11 and R-12 and was of the opinion that the 1st respondent did not study in Government Mohammadan High School, Kurnool, and that Exhibit R-12 was concocted, if it was to be argued that it relates to the present 1st respondent,"

the Judgment proceeds thus :

"During the course of the arguments before us, it was noticed that two admission registers relating to the High School for the relevant period were in fact summoned for by the learned Counsel for the petitioner and were produced before the Tribunal. For some reason, which is not clear to us, these registers were not proved and marked as exhibits. These registers were sent to the High Court for hearing of the above appeal and they were placed before us. We are told that the 1st respondent also applied that these registers may be summoned for from the High School. But when he has realised that the petitioner himself has summoned for them, it was not necessary for the 1st respondent to summon for them again. Whatever it be, these registers were before the Tribunal and are before us. But as neither party could rely upon them without their being proved and exhibited, the 1st respondent filed C.M.P. No. 7115/61 under Order 41, rule 27 and section 151, Civil Procedure Code to receive them as evidence and mark the registers as exhibits. By our order dated 21st July, 1961, we permitted the 1st respondent in the appeal to prove these documents before the Election Tribunal. We also directed that the appellant is at liberty to cross-examine the persons, who might be summoned to

prove these documents. We also directed the Tribunal to record the evidence adduced in proof of these two registers and submit the same to the High Court for consideration in the above appeal. The Tribunal accordingly recalled R.W. 8 the Head Master, Government Muslim High School, Kurnool, and also examined R.W. 10, the Head Master of the same school for the years 1936 to 1945. The Register of Admissions and Withdrawals relating to the School from 7th July, 1919 to 15th January, 1938 is marked as exhibit R-19 and the register from 30th June, 1926 to 14th February, 1949 is marked as Exhibit R-20. The entries in the two registers relating to the 1st respondent are Exhibits R-21 and R-24."

In view of what the High Court has stated in this passage it is not possible to say that the High Court made the order for admission of additional evidence without applying its mind. It seems clear that the High Court thought, on a consideration of the evidence, in the light of the arguments that had been addressed already before it that it would assist them to arrive at the truth on the question of Seetharama Reddy's age if the entries in the admission registers of the school were made available. It was vehemently urged by the learned Counsel for the appellant that there was such a volume of evidence before the High Court that it could not be seriously suggested that the Court required any additional evidence "to enable it to pronounce judgment." The requirement, it has to be remembered, was the requirement of the High Court, and it will not be right for us to examine the evidence to find out whether we would have required such additional evidence to enable "us" to pronounce judgment. Apart from this, it is well to remember that the appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the Court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under rule 27 (1) (b) of the Code.

It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. That is why in *Parsotim's case*¹, the Privy Council while discussing whether additional evidence can be admitted observed :

"It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent."

As the Privy Council proceeded to point out :

"It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands."

We are satisfied that in the present case the High Court allowed additional evidence to be admitted as it required such evidence either to enable it to pronounce judgment or for any other substantial cause within the meaning of rule 27 (1) (b) of Order 41 of the Code. The contention that the decision of the High Court on the question of the respondent's age was vitiated by reason of it being based on inadmissible evidence, must therefore fail.

Another difficulty in the appellant's way may also be mentioned. As has been said above, the appellant did file before the High Court a petition objecting to the reception of additional evidence. We find it stated however in the High Court's order refusing the application for a certificate under Article 133 (1) (c) of the Constitution that no objection that the requirements of Order 41, rule 27, Civil Procedure Code, were not satisfied, was raised either at the time when the

Court directed the Tribunal to record the statements or at the time of the hearing of the appeal. This order was passed by the learned Chief Justice and Mr. Justice Chandrasekhara Sastry, who had made the order allowing admission of additional evidence and also heard the appeal. We are bound to hold therefore that though the appellant did make an application objecting to the admission of additional evidence he did not press that application.

On the principle laid down in *Jagarnath Pershad v. Hanuman Pershad*¹, that when additional evidence was taken with the assent of both sides or without objection at the time it was taken, it is not open to a party to complain of it later on, the appellant cannot now be heard to say that the additional evidence was taken in this case in breach of the provisions of law.

There is nothing therefore that would justify us in interfering with the findings of facts on which the High Court based its decision.

The appeal is accordingly dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B.P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J.R. MUDHOLKAR AND T.L. VENKATARAMA Aiyar, JJ.

The State of Assam and another

.. *Appellants**

v.

Tulsi Singh and others

.. *Respondents.*

Northern India Ferries Act (XVII of 1878), section 8 and Rule 19 framed under the Act—Tolls of public ferry let by public auction—Refusal to accept the bid of the highest bidder—Reasons to be recorded in writing

Constitution of India (1950), Article 226—Petitions under—Jurisdiction of the High Court to issue directions—High Court not to decide matters entrusted to the Executive Authorities under the Act.

The only ground for rejecting the bid of the highest bidder, was that his name was in the "special list". In pursuance of the policy of prohibition followed in the State of Assam, the Government or Officers of the Government prepared "lists of persons suspected or confirmed to be connected with smuggling activities," and that it was "the policy of the Government not to grant taxi permit, stage carrier permit, fisheries, ferries etc., to persons who are listed to be suspected or confirmed opium smugglers," and this was referred to as the "special list" in the order of the Executive Engineer. The authorities would be exercising their discretion properly in refusing to accept the bid of a smuggler, because, to put such a person in charge of ferries must help to evade the prohibition laws, and that would be a relevant factor under Rule 19 (iii) of the Rules under the Northern India Ferries Act. But there were no materials on which the person could be held to be a smuggler. The Executive Engineer did not form any opinion about the person on his own appreciation of the materials. He found his name in the special list and straightaway rejected his bid. The "special list" is not a document falling within section 35 of the Evidence Act. It was said to be a confidential document. It did not appear on what information it was prepared or from what sources the information was received. Nor was anything disclosed as to the procedure adopted by the Government Officers in preparing the list. While such lists might serve a purpose in guiding Criminal Intelligence Department, it would be unsafe to rely solely on them for deciding civil rights of persons. If the "special list" was thus ruled out as not material on which an opinion could be formed, then there was nothing else on which the Conducting Officer could have rejected the offer of the highest bidder under Rule 19. The rejection of the offer of the highest bidder is not in accordance with section 8 or Rule 19.

It was for the appropriate authorities to deal with the matter and make a fresh settlement and the Court could not itself decide what is entrusted to the executive authorities under the Act. The Order of the High Court, in so far as it declared the rights of the highest bidder, is erroneous.

Appeal by Special Leave from the Judgment and Decree dated the 11th July, 1961, of the Assam High Court in Civil Rule No. 64 of 1961.

Naunit Lal, Advocate, for Appellants.

1. L.R. 36 I.A. 221 : 19 M.L.J. 435.

* C.A. No. 14 of 1962.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—The short question that arises for our decision in this appeal is whether the settlement by the Executive Engineer, Golaghat, in the State of Assam, of the ferry at Neparpatty on the second respondent, Phuka Chandra Gohain, on 23rd January, 1961, was in accordance with the provisions of the Northern India Ferries Act, 1878, hereinafter referred to as “the Act”, and the Rules framed thereunder.

The relevant provisions of the Act bearing on this question might now be referred to. Under section 4, the State Government may, from time to time, declare what ferries shall be deemed public ferries. Section 8 of the Act is as follows :—

“8. The tolls of any public ferry may, from time to time, be let by public auction for a term not exceeding five years with the approval of the Commissioner, or by public auction, or otherwise than by public auction, for any term with the previous sanction of the State Government.

The lessee shall conform to the rules made under this Act for the management and control of the ferry, and may be called upon by the officer in whom the immediate superintendence of the ferry is vested, or, if the ferry is managed by a municipal or other public body under section 7 or section 7-A, then by that body, to give such security for his good conduct and for the punctual payment of the rent as the officer or body, as the case may be, thinks fit.

When the tolls are put up to public auction, the said officer or body, as the case may be, or the officer conducting the sale on his or its behalf, may, for reasons recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction.”

Rule 19 framed under section 12 of the Act is as follows :—

“The sale shall generally be by auction to the highest bidder. The Officer conducting the sale for sufficient reason recorded in writing under his hand may refuse to accept the offer of the highest bidder or any bid. The Officer shall in accepting the bid consider the following factors among others :

(i) Whether the bidder is a native or domicile or an outsider. .

(ii) Whether the bidder has experience of the ferry business.

(iii) Whether he has landed property in his own name within the district or State, can speak the regional language, is financially sound and of good conduct, etc.”

The ferry at Neparpatty has been declared to be a public ferry under section 4 of the Act. On 23rd January, 1961 the Executive Engineer, Golaghat, put up the lease of the ferry for the year 1961-62 for public auction under section 8 of the Act. At the auction, Tulsi Singh, the first respondent, gave a bid for Rs. 4,200, one Indra Deo Singh for Rs. 4,050 and Phukan Chandra Gohain, the second respondent for Rs. 3,000. The Executive Engineer then made the following Order :

“Sold to Shri Phukan Chandra Gohain at Rs. 3,000 (Rupees Three thousand) only, as the two other highest bidders fall in special List.”

Under Rule 19 (a), the acceptance of the bid by the Conducting Officer is subject to the approval of the Chief Engineer, and Rule 19 (b) provides that he must, in doing so, “consider among others whether the Officer conducting the sale has taken into account and considered all the factors mentioned in Rule 19 above.” The Chief Engineer approved of the decision of the Executive Engineer dated 23rd January, 1961, and the sale to the second respondent was confirmed. Thereupon, on 6th February, 1961, the first respondent applied to the Chief Engineer for accepting his bid and settling the ferry on him. By his Order dated 7th April, 1961, the Chief Engineer rejected this petition. On 9th May, 1961, the first respondent filed in the High Court of Assam a Writ Petition under Article 226 attacking the order of the Executive Engineer dated 23rd January, 1961, settling the lease in favour of the second respondent as contrary to the Act and the Rules, and praying that it might be settled on him. The learned Judges accepted this contention and set aside the settlement in favour of the second respondent as violative of section 8 and Rule 19, and further declared that the first respondent was entitled to the settlement under Rule 19 as the highest bidder. It is against this Judgment that this appeal by Special Leave is directed.

The power of the Executive Engineer to settle public ferries is derived from section 8 of the Act and the Rules framed thereunder, and it has therefore to be

exercised in accordance therewith. Under Rule 19, the sale should generally be by auction to the highest bidder and under this provision the ferry should normally have been settled with the first respondent, who gave the highest bid. Section 8, provides that the Officer conducting the sale may, for reasons recorded in writing, refuse to accept the offer of the highest bidder and accept any other bid. The discretion thus conferred on the Officer, is wide but not indefinite or unrestricted. Rule 19 provides that in accepting the bid, he has to take into account certain factors; and under Rule 19 (b), the Chief Engineer has to satisfy himself that these factors have been taken into consideration by the Conducting Officer when he accepted the bid. It is contended for the appellant that, if there are materials before a Conducting Officer on which he could refuse to accept the highest bid and he, on a consideration thereof declines, in the exercise of his discretion, to accept it, his decision is not one which is liable to be reviewed by the Court. That is undoubtedly so but when there are no materials before him on which he could act under Rule 19, then that is a case not of exercise of discretion but of want of authority to settle under the Act. Now the only ground given in the order, dated 23rd January, 1961, for rejecting the bid of the first respondent which was the highest, is that his name is in the "special list." It appears from the affidavit of the Chief Engineer that in pursuance of the policy of prohibition followed in the State of Assam, the Government or Officers of the Government have prepared "lists of persons suspected or confirmed to be connected with smuggling activities", and that it was "the policy of the Government not to grant taxi permit, stage carrier permit, fisheries, ferries etc. to persons who are listed to be suspected or confirmed opium smugglers." It is this list that is referred to as the "special list" in the order of the Executive Engineer. It is argued for the appellant that if a person is a smuggler, then he is not a person of good conduct, and the rejection of his bid would be justified under Rule 19 (iii). The contention is perfectly sound, and the authorities would be exercising their discretion properly in refusing to accept the bid of a smuggler, because, to put such a person in charge of ferries must help to evade the prohibition laws, and that would be a relevant factor under Rule 19 (iii). But the difficulty of the appellant is that there are no materials on which the first respondent could be held to be a smuggler. It appears that he was prosecuted under section 4 of the Assam Ganja and Bhang Prohibition Act but that ended in his discharge. It is argued that though the materials available might have been insufficient to sustain a conviction under the Act, they might be sufficient for the authorities to take action under Rule 19. That is possible but that is not the position in this case. The Executive Engineer did not form any opinion about the first respondent on his own appreciation of the materials. He found his name in the "special list" and straightaway rejected his bid. Now the question is whether on this material an order rejecting the highest bid could be made under Rule 19. It is not and cannot be argued that the "special list" is a document falling within section 35 of the Evidence Act. It is said to be a confidential document. It does not appear on what information it is prepared or from what sources the information is received. Nor is anything disclosed as to the procedure adopted by the Government Officers in preparing the list. While such lists might serve a purpose in guiding Criminal Intelligence Department, it will be unsafe to rely solely on them for deciding civil rights of persons. If the "special list" is thus ruled out as not material on which an opinion could be formed, then there was nothing else on which the Conducting Officer could have rejected the offer of the highest bidder under Rule 19. We are accordingly of opinion that the decision of the learned Judges, of the High Court that the rejection of the offer of the highest bidder is not in accordance with section 8 or Rule 19 is correct.

The result of this conclusion is that the authorities under the Act would have to be directed to consider the matter afresh and give a decision in accordance with law, but the learned Judges have proceeded further and observed that under Rule 19, the offer of the first respondent, being the highest, should be accepted. The appellant contends that even on the view that the order of the Executive Engineer

dated 23rd January, 1961, is not in accordance with law, it was for the appropriate authorities to deal with the matter and make a fresh settlement and that the Court could not itself decide what is entrusted to the executive authorities under the Act. This, in our opinion, is correct. In *Verappa Pillai v. Raman & Raman Ltd.*¹, the question arose with reference to the grant of permits under the Motor Vehicles Act. The authorities constituted under the Act had made an order granting permits to one Verappa Pillai, and its validity was disputed by a rival applicant M/s. Raman and Raman Ltd., in an application under Article 226. The High Court of Madras had held that the title of the applicant would prevail over that of Verappa Pillai and accordingly set aside the order of the authorities and directed the grant of the permits to the applicants. On appeal to this Court, it was held that such a direction was clearly in excess of the powers and jurisdiction of the High Court. We must accordingly hold that the Order of the High Court, in so far as it declared the rights of the highest bidder, is erroneous. But, in view of the fact, that the lease was only for the period 1961-62 and that would shortly be expiring, there is no need to direct a fresh consideration of the matter by the authorities. In the result, the appeal is dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, M. HIDAYATULLAH AND J.C. SHAH, JJ.

Lakkireddi Chinna Venkata Reddi and others

.. *Appellants**

v.

Lakkireddi Lakshmama

.. *Respondent.*

Hindu law—Joint family—Partition—Suit for on behalf of minor by his mother—Death of minor—Effect—Suit if can be continued by the mother—Blending of separate property with joint family property—Test.

It is true that normally the family estate is better managed in union than in division, nevertheless the interest of the minor is the prime consideration in adjudging whether the estate should be divided at the instance of a minor suitor. If the conduct of the adult coparceners, or the claim made by them is prejudicial to the interest of the minor, the Court will readily presume that it is for his benefit to divide the estate.

Action by a minor for a decree for partition and separate possession of his share in the family property is not founded on a cause of action personal to him. The right claimed is property, and devolves on his death even during minority upon his legal representative. The Court, it is true will direct partition only if partition is in the interest of the minor but that limitation arises not because of any peculiarity in the estate of the minor but is imposed for the protection of his interest. The effect of the decision of the Court granting a decree for partition in a suit instituted by a minor is not to create a new right which the minor does not possess, but merely to recognise the right which accrued to him when the action was commenced. It is the institution of the suit, subject to the decision of the Court, and not the decree of the Court that brings about the severance. Death of the minor during the pendency of the suit had not the effect of terminating the suit which was instituted for partition of the property in suit and the suit can be continued by his mother as his legal representative.

Kakumanu Peda Subbayya v. Kakumanu Akkamma, (1959) S.C.J. 138 : (1959) 1 An.W.R. (S.C.) 60 : (1959) 1 M.L.J. (S.C.) 60 : (1959) S.C.R. 1249, followed.

Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein, but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation.

Appeal from the Judgment and Decree dated 21st October, 1955 of the former Andhra High Court, in A.S. No. 64 of 1951.

A. Ranganadham Chetty, Senior Advocate, (*A. Veda valli* and *A.V. Rangam*, Advocates, with him), for Appellants.

1. (1952) S.C.J. 261 : (1952) S.C.R. 583 : (1952) 1 M.L.J. 806.

*C.A. No. 251 of 1961.

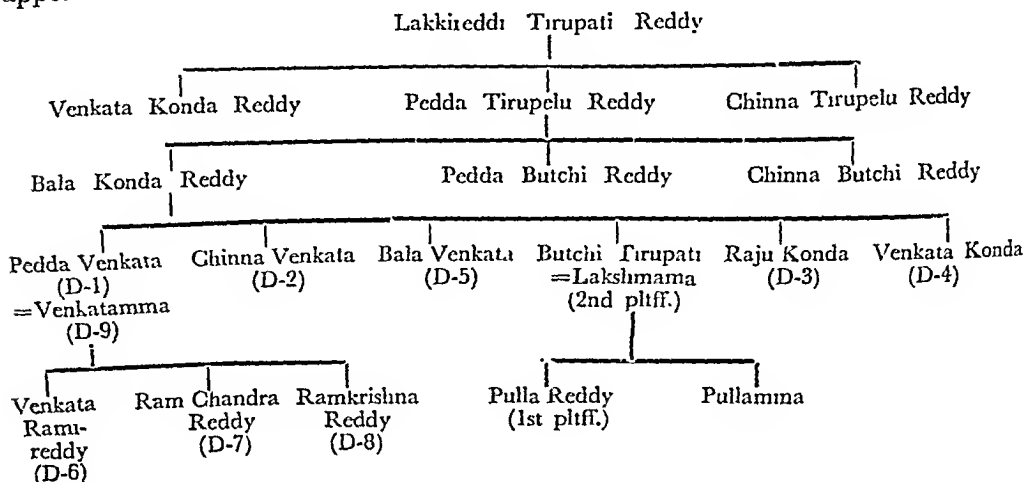
4th March, 1963.

B.K.B. Naidu, Advocate, for Respondent.

The Judgment of Court was delivered by

Shah, J.—This appeal with certificate granted by the High Court of Andhra Pradesh is against the decree in Appeal No. 64 of 1951 modifying the decree in Suit No. 111 of 1949 of the file of the Subordinate Judge, Cuddapah.

The following genealogy explains the relationship between the parties to the appeal :



Butchi Tirupati was one of the six sons of Bala Konda. Pulla Reddy and Lakshmamma—son and widow respectively of Butchi Tirupati—instituted Suit No. 111 of 1949 in the Court of the Subordinate Judge, Cuddapah for partition and separate possession of their share in the property of the joint family to which they belonged and a fourth share in certain property devised under the will executed by Venkata Konda Reddy, on 1st July, 1910. Pulla Reddy was at the date of the suit a minor and his mother Lakshmamma acted as his next friend. Pulla Reddy died during the pendency of the suit and Lakshmamma was shown in the record as his legal representative for the suit. The Trial Court held that the property devised under the will of Venkata Konda Reddy in favour of Pedda Venkata (D-1), Chinna Venkata (D-2), Bala Venkata (D-5) and Butchi Tirupati had on account of blending with the joint family estate been impressed with the character of joint family property, and on that account Lakshmamma was entitled to a fifth share in all the property in suit. The High Court in appeal awarded to Lakshmamma a fourth share in the property devised under the will of Venkata Konda Reddy and confirmed the decree of the Trial Court awarding a fifth share in the property of the joint family. Defendant-2 Chinna Venkata, Defendant-3 Raju Konda and Defendant-4 Venkata Konda have appealed to this Court, with certificate under Article 133 (1) (a) granted by the High Court.

Two questions survive in this appeal :

(1) Whether Suit No. 111 of 1949 for partition of joint family property could, after the death of the minor Pulla Reddy, be continued by his mother Lakshmamma. That question necessitates an investigation whether the suit was instituted for the benefit of the minor Pulla Reddy, because it is settled law that the Court will not grant a decree for partition of joint family property in a suit instituted by a Hindu minor through his next friend, unless the Court is satisfied that the partition is likely to be for the benefit of the minor by advancing or protecting his interest; and

(2) Whether the property devised under the will of Venkata Konda Reddy in favour of defendants 1, 2, 5 and Butchi Tirupati had, because of blending with their joint family estate, been impressed with the character of joint family property.

We will set out such facts as have a bearing on these questions.

It is common ground that at the date of his death in 1947 Butchi Tirupati was a member of a Hindu coparcenary consisting of himself, his five brothers and Pulla Reddy. After the death of Butchi Tirupati, defendants 1, 2, 3 and 4 purported to partition the estate in their possession, and executed a deed of partition (Exhibit A-3) on 12th August, 1948, in which the minor Pulla Reddy was represented by the fourth defendant. By this deed certain properties were allotted to the share of the first defendant Pedda Venkata, but the deed was silent about the dissolution of the joint family *qua* other members of the family, and about allotment of shares to those members. Thereafter Lakshmama instituted the suit out of which this appeal has arisen on behalf of herself and as next friend of her minor son, for a decree for partition of their share in the estate of the joint family and the property devised under the will of Venkata Konda Reddy, alleging that defendants 2, 3 and 4 declined to give to the minor Pulla Reddy his share in the estate, and drove her and the minor away from the family house, and that with a view to prejudice the right of the minor in the property they had brought into existence a deed of partition which did not disclose the entire estate of the joint family. The first defendant substantially admitted the claim of the plaintiffs to a share in the properties in suit. Defendants 2, 3 and 4 denied that the two plaintiffs were driven away from the joint family house as alleged by Lakshmama, and submitted that it would be "highly prejudicial" to the interests of Pulla Reddy to have his share separated from the joint family estate. They contended that the property of Venkata Konda Reddy had devolved by survivorship on their father Bala Konda and after the death of Bala Konda, his sons (defendants 1 to 5 and Butchi Tirupati) took it by survivorship, that the will executed by Venkata Konda Reddy was not valid because it attempted to devise property which belonged to the joint family, that in any event the property devised under that will had been blended with the joint family estate and had been treated as of the joint family and on that footing were included in the partition deed dated 12th August, 1948, and that certain lands—items Nos. 6, 7 and 8 in the schedule annexed to the plaint—had been given to Chinamma sister of the contesting defendants for her maintenance and were not liable to be partitioned.

The trial Court held that partition of the property of the joint family was for the benefit of the minor Pulla Reddy and the High Court affirmed that view.

The contentions raised in the written statement filed by defendants 2, 3 and 4 clearly disclose that the continuance of the joint family status would be prejudicial to the interest of the minor Pulla Reddy. They denied that certain items of property which were found by the Court to be joint family property were of that character: they sought to set up title of their sister Chinamma to certain other property, and pleaded that the property devised under the will of Venkata Konda Reddy had ceased to be the separate property of the devisees. The evidence on the record establishes that the contesting defendants made it difficult for Pulla Reddy and his mother Lakshmama to live in the joint family house. The deed dated 12th August, 1948 which included some and not all the joint family property for the purpose of partition, appeared also to be an attempt to create evidence that the property set out in the deed was the only estate of the joint family. It is true that normally the family estate is better managed in union than in division, nevertheless the interest of the minor is the prime consideration in adjudging whether the estate should be divided at the instance of a minor suitor. If the conduct of the adult coparceners, or the claim made by them is prejudicial to the interest of the minor, the Court will readily presume that it is for his benefit to divide the estate. The conclusion recorded by the Trial Court and the High Court that partition would be for the benefit of the minor was amply supported by evidence. In the circumstances it is unnecessary to express any opinion on the question whether Lakshmama was entitled in her own right to file a suit for a share in the property of the joint family, and for the share of her husband Butchi Tirupati in the estate devised under

the will of Venkata Konda Reddy and prosecute it after the death of her son Pulla Reddy.

Action by a minor for a decree for partition and separate possession of his share in the family property is not founded on a cause of action personal to him. The right claimed is in property, and devolves on his death even during minority upon his legal representative. The Court, it is true, will direct partition only if partition is in the interest of the minor but that limitation arises not because of any peculiarity in the estate of the minor but is imposed for the protection of his interest. The effect of the decision of the Court granting a decree for partition in a suit instituted by a minor is not to create a new right which the minor did not possess, but merely to recognise the right which accrued to him when the action was commenced. It is the institution of the suit, subject to the decision of the Court, and not the decree of the Court that brings about the severance. In *Kakumanu Peda Subbayya and another v. Kakumanu Akkamma and another*¹ it was held by this Court that a suit filed on behalf of a Hindu minor for partition of joint family properties does not on the death of the minor during the pendency of the suit abate, and may be continued by his legal representative and decree obtained therein if the Court holds, that the institution of the suit was for the benefit of the minor. Death of the minor Pulla Reddy during the pendency of the suit had not, therefore, on the view ultimately taken by the Court, the effect of terminating the suit which was instituted for partition of the property in suit.

We may now consider the second question, about the quantum of interest awardable to Lakshmamma in the property devised under the will of Venkata Konda Reddy. Lakkireddi Tirupati had three sons, Venkata Konda Reddy, Pedda Tirupelu Reddy and Chinna Tirupelu Reddy. Venkata Konda Reddy executed a will on 1st July, 1910 devising in favour of the four sons of his nephew Bala Konda, named, Pedda Venkata, Chinna Venkata, Bala Venkata and Butchi Tirupati (who were born before the date of the will), all his property which he claimed to have received on partition between him and his brothers. Bala Konda instituted on 2nd July, 1910, Suit No. 466 of 1910 in the Court of the District Munsif, Proddatur for division of properties which he claimed were jointly enjoyed by him and his two uncles Venkata Konda Reddy and Chinna Tirupelu Reddy. Under a decree dated 26th June, 1911 passed in the suit with the consent of parties the property in suit was divided into five shares one of which was allotted to Bala Konda and the rest was taken in two equal moieties by his two uncles. Venkata Konda Reddy died in 1915 and the property which fell to his share by the compromise decree devolved by virtue of the disposition under his will on the four sons of Bala Konda. It is contended by defendants 2, 3 and 4 that the property devised under the will of Venkata Konda Reddy became by subsequent blending, property of the joint family, and the plaintiffs were not entitled to claim a share larger than the share they had in the joint family property. It may be mentioned that defendants 3 and 4 were born after the date of Venkata Konda's will, and they were not devisees under that will.

Law relating to blending of separate property with joint family property is well-settled. Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein: but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation. It is true

1. (1959) S.C.J. 138; (1959) 1 An.W.R. (S.C.) 60; (1959) 1 M.L.J. (S.C.) 60; (1959) S.C.R. 1249.

that Butchi Tirupati who was one of the devisees under the will of Venkata Konda Reddy was a member of the joint family consisting of himself, his five brothers and his father Bala Konda. It is also true that there is no clear evidence as to how the property was dealt with, nor as to the appropriation of the income thereof. But there is no evidence on the record to show that by any conscious act or exercise of volition Butchi Tirupati surrendered his interest in the property devised in his favour under the will of Venkata Konda Reddy so as to blend it with the joint family property. In the absence of any such evidence, the High Court was, in our judgment, right in holding that Lakshmama was entitled to a fourth share in the property devised under the will of Venkata Konda Reddy.

The appeal therefore fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Ahmad Hafiz Khan

.. *Appellant**

v.

Mohammad Hasan Khan

.. *Respondent.*

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, (I of 1951), section 43—Scope—Cultivating rights in the 'sir' land—If could be the subject-matter of sale in execution of a money-decree passed prior to vesting of estate in the State.

By section 43 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), attachment and sale of the cultivating right in 'sir' lands is barred unless there is a mortgage of or a charge on, the cultivating rights. This section applies to decrees in respect of debts prior to the vesting in the State as in the present case. In the present case the attachment was before, and the sale after the date when the Abolition Act came into force in this area. There was no mortgage of or charge on the cultivating rights in 'sir' lands. The decree-holder had only a money-decree and the attachment cannot be said to have created a charge on the attached property so as to make it a *secured debt* within the latter part of section 43 of the Act. The sale was, therefore, without jurisdiction and thus illegal.

Appeal by Special Leave from the Judgment and Order dated 24th December, 1959 of the Madhya Pradesh High Court in Misc. Second Appeal No. 3 of 1959.

W. S. Barlingay, Senior Advocate, (*A.G. Ratnaparkhi*, Advocate, with him), for Appellant.

Ganpat Rai, Advocate, for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—One Mohd. Yusaf obtained a money-decree for Rs. 1,277-7-0 against the appellant, Ahmad Hafiz Khan, on 14th January, 1950. In execution of the decree, Mohd. Yusaf attached two annas and 7/45 pies share of the appellant in Mouza Tumhari, Tahsil Sakti, District Bilaspur, along with *sir* and *Khudkasht* lands appurtenant thereto. The attachment was made on 28th September, 1950. On 31st March, 1951, before the sale took place, the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M.P. Act No. 1 of 1951) was made applicable to that area. In view of the provisions of the Abolition Act the proprietary rights in the village vested in the State. Thus far there is no dispute.

On 1st October, 1951, the fields under attachment were put to sale and were purchased by the respondent, Mohd. Hasan Khan. The appellant filed an application setting forth objections under Order 21, rule 90 of the Code of Civil Procedure but the application was dismissed and the sale was confirmed on 1st February, 1952. The judgment-debtor appealed against the order dismissing the application and on 1st May, 1952, the Additional District Judge, Bilaspur, set aside

the sale, and possession of the property was restored to the appellant. On further appeal by the auction purchaser the order of the Additional District Judge was reversed and the auction purchaser was put in possession of the property on 16th April, 1955. Both the appellant and the auction purchaser applied to the executing Court. The appellant raised further objection while the auction purchaser asked for mesne profits under section 144 of the Code of Civil Procedure. We are concerned with the application of the appellant. The objection of the appellant was dismissed by the Civil Judge and his successive appeals to the District Judge and the High Court also failed. The judgment of the High Court was passed on 24th December, 1959 and the present appeal is filed against that judgment with the Special Leave of this Court. The contention of the appellant is that the cultivating rights in the *sir* lands could not be the subject-matter of sale in execution of the decree in view of section 43 of the Abolition Act. This argument was not accepted by the High Court and it is contended that the decision of the High Court is erroneous. In our opinion the contention must be sustained.

Under the Central Provinces Tenancy Act, 1920, a proprietor losing his right to occupy *sir* land, as a proprietor, became from the date of such loss of right an occupancy tenant of *sir* lands. This was provided by section 49 of the Act which, in so far as relevant to the present purpose, read as follows :—

"49. (1) A proprietor, who temporarily or permanently loses, whether under a decree or order of a Civil Court or a transfer or otherwise, his right to occupy his *sir* land in whole or in part, as a proprietor, shall, at the date of such loss, become an occupancy tenant of such *sir* land except in the following cases,—

(a) when a transfer of such *sir* land is made by him expressly agreeing to transfer his right to cultivate such *sir* land ; or

(b) when such *sir* land is sold in execution of, or foreclosed under a decree of a Civil Court which expressly directs the sale or foreclosure of his right to cultivate such *sir* land."

(The other sub-sections are not relevant.)

The effect of the loss of proprietorship by reason of the Abolition Act is almost the same except that a new right is created in the quondam proprietor in respect of his *sir* lands. On the passing of the proprietary interest to the State what remains to the proprietor is his cultivating rights in the *sir* fields and the Abolition Act provides in section 4 (2) that the proprietor "shall continue to retain the possession of his home-farm land." "Home-farm" is defined by section 2 (g) (i) as "land recorded as *sir* and *khudkash* in the name of the proprietor in the annual papers for the year 1948-49." Thus by the operation of the Abolition Act, the proprietor ceases to be the proprietor of the estate or village including the *sir* lands appurtenant to the proprietorship. But the cultivating rights in the *sir* lands which were his home-farm are saved to him and under section 38 of the Abolition Act he becomes a *malik makbuza* of these fields. The Abolition Act having deprived the proprietors of their proprietary interest gave some protection to them in respect of their new rights in the home-farm which has become the *malik makbuza* of the proprietor. Section 43 of the Abolition Act provided as follows :—

"Any land which immediately before the date of vesting, was held in absolute occupancy or occupancy right or recorded as *sir* land, shall not be liable to attachment or sale in execution of a decree or order for the recovery of any debt incurred before the date of vesting except where such debt was validly secured by mortgage or a charge on the absolute occupancy or occupancy land or the cultivating right in the *sir* land."

By this section attachment and sale of the cultivating right in *sir* lands is barred unless there is a mortgage or a charge on the cultivating rights. The section applies to decrees in respect of debts prior to the vesting in the State as in the case here.

In the present case the attachment was before, and the sale after the date when the Abolition Act came into force in this area. There was no mortgage or charge on the cultivating rights in *sir*. The decree-holder Mohd. Yusaf had only a money-decree and the attachment cannot be said to have created a charge

on the attached property so as to make it a secured debt within the latter part of section 43. There being no secured debt and the cultivating rights not having been mortgaged or charged there could be no sale of these fields after the Abolition Act came into force. The sale was, therefore, without jurisdiction, and thus illegal.

The learned single Judge in the High Court relied upon a Division Bench ruling of his own Court reported in *Govind Prasad v. Pawan Kumar*¹, where it was held that after the Abolition Act an attachment of the proprietary share in the village including the *sir* and *khudkasht* lands appurtenant thereto made before the Abolition Act got transferred to the home-farm after the appointed date. It is argued that if the attachment could subsist on the home-farm then the home-farm could also be sold. In the ruling the question whether a sale of the cultivating rights in the home-farm could take place after the Abolition Act came into force was not considered at all. There the attachment had been effected before the Abolition Act came into force and it was held that the attachment must continue on the home-farm. It was not noticed that the attachment would be useless if the sale could not take place and the attention of the Bench does not appear to have been drawn to the provisions of section 43 of the Abolition Act, otherwise the Bench would have mentioned it. In any event, the words of section 43 are quite clear and the cultivating rights in the *sir* and *khudkasht* land which became under the Act the home-farm of the proprietor are protected against sale except where those cultivating rights were the subject of a mortgage or a charge created by the proprietor. That condition does not exist in the present case and the sale, therefore, must be declared to be without jurisdiction and ordered to be set aside.

We accordingly allow the appeal and set aside the sale in respect of the *sir* lands appurtenant to the original proprietary share. The appellant shall be entitled to his costs in this Court but costs incurred in the High Court or the Court below shall be borne as incurred.

K.L.B.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Hari Narain

.. Appellant*

v.

Badri Das

.. Respondent.

Constitution of India (1950), Article 136—Special Leave granted on petition containing material statements which are later on found to be inaccurate and misleading—Effect—Leave granted has to be revoked.

Where the material statements made by the appellant in his application for Special Leave are inaccurate and misleading, the respondent is entitled to contend that the appellant may have obtained Special Leave on the strength of "misrepresentations of facts" contained in the petition for Special Leave and therefore the Special Leave granted to the appellant should be revoked. What was actually urged before the Court in obtaining leave is not decisive of the matter and may not even be very material. It is no answer to the respondent's contention that though the material statements in the Special Leave petition may be substantially inaccurate though not wholly untrue, those statements may not have influenced the Court in granting Special Leave. It is of utmost importance that in making material statements and setting forth grounds in applications for Special Leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for Special Leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading.

Accordingly the Special Leave granted to the appellant ought to be revoked.

Appeal from the Judgment and Decree dated 30th July, 1962 of the Rajasthan High Court in Civil Regular S.A. No. 223 of 1961.

1. (1955) N.L.J. 678.

* Civil Appeal No. 14 of 1963.

4th March, 1963.

M. C. Setalvad and *S. T. Desai*, Senior Advocates, (*Naunit Lal*, Advocate with them), for Appellant.

G. S. Pathak, Senior Advocate, (*S. N. Andley*, Advocate of *M/s. Rajinder Narain & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—It is not necessary to deal with the merits of the points which the appellant wanted to raise before us in this appeal, because we are satisfied that the respondent's prayer that the Special Leave granted to the appellant should be revoked, is well-founded. The appellant is a tenant of the premises in suit which are owned by the respondent. These premises were let out to the appellant by the respondent under a rent-note executed on the 8th December, 1953. The appellant was permitted to use the said premises for his Oil Mill. The terms of the lease provided that the appellant was to pay to the respondent the agreed rent every month and in case of default for three months the respondent was entitled to evict the appellant before the expiry of the stipulated period which was five years, and in that case he was entitled also to claim the rent for the remaining period.

On the 2nd of May, 1959, the respondent sued the appellant for ejectment in the Court of Munsif, East Jaipur City. He alleged that he had received the rent from the appellant up to the 31st October, 1957 and that thereafter the appellant had defaulted in the payment of rent in spite of repeated demands, and that even at the date of the suit he was in arrears of rent and had failed to pay the house tax according to the agreement. His case was that the appellant's tenancy had expired on the 1st December, 1958, by efflux of time, but the appellant nevertheless failed to deliver over possession of the premises to the respondent. He, however, purported to deposit a lumpsum of Rs. 1,053 to cover the period from 1st November, 1957 to 30th November, 1958 which was due from him. The respondent pleaded that the appellant had committed more than three defaults in the payment of rent of two months each during the period of 18 months and that even at the date of the suit, the rent or mesne profits for 5 months and 2 days still remained to be paid. That is the basis on which a decree for ejectment was claimed by the respondent against the appellant.

The appellant denied the respondent's claim and alleged that the respondent was not entitled to claim ejectment against him by virtue of the provisions of section 13 (1) (a) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (Act XVII of 1950) (hereinafter called the Act). He also pleaded that by virtue of the fact that the respondent had accepted rent paid by the appellant he had waived his right to evict him. In other words, he denied that there was any default, and resisted the respondent's prayer for his ejectment. At the date of the first hearing of the suit in the trial Court, the appellant deposited Rs. 648 on account of rent due up to the said date and the said payment was accepted by the respondent without prejudice.

On these pleadings, the learned trial Judge framed four issues, the principal issue being whether the appellant had committed three defaults of two months within the period of 18 months in the payment of rent? The finding of the trial Court on the said issue as well as on the other issues framed by it was in favour of the appellant. In the result, the respondent's suit was dismissed.

The respondent then preferred an appeal in the Court of the Additional Sessions Judge, Jaipur City. The appellate Court held that on the facts proved by the respondent, the three defaults had been committed by the appellant, and so, he was entitled to a decree for ejectment. On these findings, the decree passed by the trial Court was set aside and the respondent's claim for ejectment was allowed.

The appellant challenged this decision by preferring a Second Appeal before the Rajasthan High Court. This appeal was heard by a learned single Judge of the said High Court and was dismissed. The appellant's request for leave to prefer

an appeal under Letters Patent was rejected by the learned Judge. It is against the decision of the learned single Judge in Second Appeal that the appellant applied for and obtained Special Leave to appeal to this Court.

The main point which the appellant wanted to urge before this Court was in regard to the construction of section 13 (1) (a) of the Act read with section 13 (4), but as we have already indicated, we do not reach the stage of dealing with the merits of this point, because we are satisfied that the material statements made by the appellant in his application for Special Leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained Special Leave from this Court on the strength of what he characterises as misrepresentations of facts contained in the petition for Special Leave. In the said petition, the appellant has taken six grounds of appeal against the decision of the High Court. The last ground is that the respondent had claimed eviction in the Court on the basis of alleged non-payment and non-tender of payment of rent from the 2nd December, 1958, but the First Appellate Court and the High Court set up a new case for the landlord by taking into consideration the alleged defaults prior to 2nd December, 1958, and not relied upon by the landlord himself. This ground was presumably taken in support of the main argument that the High Court had not correctly interpreted the provisions of section 13 (1) (a) of the Act. The respondent contends that this is a complete mis-statement of the true position and in support of his argument he has referred us to paragraph 3 in the plaint. It appears that the rent due from the appellant for the period between 1st November, 1957 to 30th November, 1958, which had fallen in default was deposited by him by cheque on the 2nd December, 1958. Paragraph 3 of the plaint specifically refers to these defaults and in fact, takes into account the said defaults for the purpose of setting up the respondent's case that the appellant had committed more than three defaults in the payment of rent of two months each during the period of 18 months. Therefore, there is no doubt that the unambiguous and categorical statement made in the last ground of the appellant's petition for Special Leave is wholly untrue.

Similarly, it appears that in another ground taken in the Special Leave petition, the appellant has made an equally inaccurate statement. In this ground the appellant represented that by reason of the payments made by him towards rent due from him to the respondent he had become a statutory tenant and "admittedly did not make any default after 1st December, 1958." This statement must be read along with and in the light of the material averments contained in paragraph 6 of the petition where the appellant has stated that on the first hearing he deposited Rs. 648 on account of rent due up to that date and the respondent accepted it. Both these statements omit to refer to the material fact that the deposit made in Court was accepted by the respondent without prejudice, and so, the statement in the ground that the appellant admittedly did not make any default after the 1st December, 1958, is equally untrue. Pathak for the respondent urges that in view of these serious mis-statements contained in the petition for Special Leave, his client is justified in assuming that Special Leave may have been granted to the appellant as a result of the argument urged by him on the strength of these mis-statements, and so, he has pressed his petition that the Special Leave granted to the appellant should be revoked.

On the other hand, Mr. Setalvad contended that he had appeared at the time when Special Leave was granted and to the best of his recollection he had not referred to these grounds, but had merely urged his contention that the High Court had misconstrued section 13 (1) (a) of the Act. We have no hesitation in accepting Mr. Setalvad's statement; but, in our opinion, in dealing with respondent's prayer that Special Leave granted to the appellant should be revoked, what was actually urged before the Court cannot be decisive on the matter and may not even be very material. It is true that in the present case, Special Leave was granted on the 26th September, 1962, and it is possible for Mr. Setalvad to recall what he argued before the Court when Special Leave was granted. But it is neces-

sary to bear in mind that the appeal may come on for hearing long after Special Leave is granted, that counsel appearing at the stage of admission may not be same as at the stage of final hearing, and the Bench that granted Special Leave may not necessarily deal with the appeal at the final stage. Therefore, it is no answer to the respondent's contention that though the material statements in the Special Leave petition may be substantially inaccurate, though not wholly untrue, those statements may not have influenced the Court in granting Special Leave. Mr. Setalvad has also invited our attention to the fact that the impugned statements and grounds are substantially copied from the averments made in the appeal before the High Court. That may be so, but the fact still remains that two important statements which, if true, may have been of considerable assistance to the appellant in invoking the protection of section 13 (1) (a) even on the construction placed by the High Court on that section are found to be untrue, and that, in our opinion, is a very serious infirmity in the petition itself. It is of utmost importance that in making material statements and setting forth grounds in applications for Special Leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for Special Leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, Special Leave granted to the appellant ought to be revoked. Accordingly, Special Leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent.

Mr. Setalvad requested us to give the appellant some time to vacate the premises. He invited our attention to the fact that the appellant has invested large amounts in setting up machinery of the Oil Mill which he is running in the premises in question. Mr. Andley for the respondent has fairly conceded that on condition that the appellant unconditionally undertakes to deliver possession of the premises to the respondent within six months from the date of this judgment he would not execute the decree for ejectment. Mr. Setalvad offered an unconditional undertaking on behalf of the appellant as suggested by Mr. Andley. We accordingly direct that on the appellate's undertaking, the respondent should not execute the decree for six months from today.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR, M. HIDAYATULLAH AND N. RAJAGOPALA AYYANGAR, JJ.

Lakshmi Achi and others

.. *Appellants**

v.

T.V.V. Kailasa Thevar and others

.. *Respondents.*

Madras Agriculturists Relief Act (IV of 1939), as amended by Act (XXIII of 1948), section 19 (2) read with section 16 (iii) of Amending Act—Scope—Trial Court decree passed before commencement of Principal Act and appellate decree affirming it passed subsequent to commencement of Principal Act—Right of debtor to benefits of section 19 (2).

In a mortgage suit the trial Court passed a preliminary decree on 15th May, 1937, and a final decree on 28th January, 1938. These decrees however were superseded by the preliminary decree which the High Court passed on appeal on 25th March, 1942, and as far as defendant No. 1 was concerned, the decree of the trial Court was affirmed subject to slight modification regarding the rate of interest. When no payments were made as directed by the preliminary decree of 25th March, 1942, a final decree in terms of that decree was passed by the trial Court on 25th September, 1943. This was the decree put in execution. On a question as to the right of defendant No. 1 to the benefits of section 19 (2) of the Madras Agriculturists Relief Act, as amended by Act XXIII of 1948.

Held, the operative decree in the instant case was the preliminary decree made by the High Court on 25th March, 1942, which was made final on 25th September, 1943. Therefore sub-section (2) of section 19 is attracted as also the provisions of section 16 of the Amending Act of 1948. Those

provisions entitle defendant No. 1 to the benefits of the Principal Act, even though his earlier applications prior to the Amending Act of 1948 were rejected. Section 19 (2) of the Principal Act read with section 16 of the Amending Act creates a new right in favour of defendant No. 1 and that right cannot be defeated on the principle of *res judicata*.

Appeal by Special Leave from the Judgment and Order, dated the 2nd December, 1955 of the Madras High Court in C.M.A. No. 355 of 1951.

A. V. Viswanatha Sastri, Senior Advocate (R. Ganapathy Iyer, Advocate and G. Gopalakrishnan, Advocate of M/s. Gagrati & Co., with him), for Appellants.

M. K. Ramamurthi, D.P. Singh, R.K. Garg and S.C. Agarwal, Advocates of M/s. Ramamurthi & Co., for Respondent No. 1.

The Judgment of the Court was delivered by

S.K. Das, J.—This is an appeal by Special Leave from the judgment and order of the Madras High Court dated 2nd December, 1955, by which the said Court set aside the order of the learned District Judge of East Tanjore dated 30th August, 1950, passed on an application made by the 1st respondent herein, under section 19 of the Madras Agriculturists Relief Act (IV of 1938), hereinafter called the principal Act, as amended by the Madras Agriculturists Relief (Amendment) Act of 1948 (XXIII of 1948). By the said order the learned District Judge dismissed the application as unsustainable in law. The High Court set aside that order on the ground that the respondent's application for the scaling down of the decree passed against him should not have been dismissed *in limine* and the learned District Judge should have gone into the question whether the respondent was an agriculturist entitled to the benefits of the principal Act as amended in 1948.

The material facts are not very much in controversy, but this is one of those cases in which a long history must be stated for the appreciation of a very short point involved in the case. The short point involved is, whether the application made by the 1st respondent herein to the District Judge of East Tanjore in O.S. No. 30 of 1934 on 6th December, 1950, was unsustainable in law.

We may now state the long history. The appellants before us are the representatives of the original plaintiffs who as mortgagees instituted a suit (being O.S. No. 30 of 1934) in the Court of the District Judge, East Tanjore, for the enforcement of a mortgage against respondent No. 1, who was defendant No. 1 in the suit, and six other persons. The mortgage bond upon which the suit was brought was executed by defendant No. 1 for himself and his minor undivided brother, defendant No. 2, and also as authorised agent on behalf of defendants 3 to 7, who were interested in a joint family business. The suit was contested by all the defendants, except defendant No. 1 against whom it proceeded *ex parte*. A preliminary decree was passed on 15th May, 1937, by which a sum of Rs. 1,08,098 was directed to be paid by defendant No. 1 and defendants 3 to 7, in default of which the plaintiffs were declared entitled to apply for a final decree for sale of the mortgaged property and the suit was dismissed as against defendant No. 2. Against this decree, two appeals were taken to the Madras High Court, one by defendants 3 to 7 (being Appeal No. 48 of 1938) who contended that the mortgage was not binding on them or on their shares in the joint family property; and the other by the plaintiffs (being Appeal No. 248 of 1938), who challenged the propriety of the judgment of the trial Judge in so far as it dismissed their claim against defendant No. 2. During the pendency of these appeals the principal Act came into force and applications were made by defendants 2 to 7 to the High Court praying that in the event of a decree being passed against them, the decretal debt might be scaled down in accordance with the provisions of the principal Act. Defendant No. 1 who did not appeal at any stage of the proceedings did not make any such application. The High Court forwarded these applications to the lower Court for enquiry and asked for a finding on the question whether the applicants were agriculturists and if so, to what extent the decretal dues should be scaled down. The District Judge made the necessary enquiry and submitted a finding that the applicants were agriculturists and that the debt, if scaled down, would amount to Rs. 49,255 with interest thereon at six per cent per annum from 1st October, 1937, exclusive of costs. On receipt of this finding the appeals were set down for final hearing and by their

judgment dated 25th March, 1942, the learned Judges of the Madras High Court accepted the finding of the Court below and held that defendants 2 to 7 were entitled to have the debt scaled down, but as no application had been made on behalf of defendant No. 1 he was held entitled to no relief under the principal Act. A decree was drawn up in accordance with this judgment. The amount due by defendants 2 to 7 was stated to be Rs. 49,255 with interest thereon at six per cent per annum while so far as defendant No. 1 was concerned the decree of the trial Judge was affirmed subject to a slight modification regarding the rate of interest. Defendant No. 1 thereupon filed an application in the Court of the District Judge, East Tanjore, claiming relief under the principal Act alleging that he too was an agriculturist and hence entitled to the benefits of the Act. This application was dismissed on 25th February, 1943, on the ground that as a decree had already been passed by the High Court definitely negating his claim to any relief under the principal Act, such application was not entertainable by the lower Court. The next step taken by defendant No. 1 was to file an application in the High Court itself praying for setting aside the *ex parte* decree which excluded him from the benefits of the principal Act. This application was rejected by the High Court on 13th December, 1943. As no payment was made in accordance with the preliminary decree passed by the High Court, a final decree in terms of the same was passed by the District Judge on 25th, September, 1943. Proceedings for execution of this final decree were started on 16th August, 1944, when an execution petition was filed in the Court of the District Judge, East Tanjore. Some of the mortgaged properties were sold and purchased by the decree-holders for a total sum of Rs. 12,005 and part satisfaction of the decree was entered for that amount. In the course of these proceedings certain terms of settlement were offered by the judgment-debtors. The estate of the decree-holders was then in the hands of the receivers, and it appears that the receivers agreed, with the sanction of the Court, to receive Rs. 24,000 only from or on behalf of defendant No. 2 and release him and his share of the mortgaged property from the decretal charge. Likewise the receivers agreed to receive Rs. 48,000 from defendants 3 to 7 and to release them and their properties from the decretal debt. With regard to defendant No. 1 also the receivers agreed to accept Rs. 37,500 and it was agreed that if one Yacob Nadar paid the amount on behalf of defendant No. 1 in consideration of the decree against defendant No. 1 being assigned to him, the receivers would accept the same. No such payment was however made on behalf of defendant No. 1. But a sum of Rs. 24,000 was paid on behalf of defendant No. 2 and his properties were exonerated from the decree. Defendants 3 to 7 also paid a sum of Rs. 48,000 and odd in two instalments in discharge of their decretal debt. The three amounts paid by defendants 2 to 7 totalled Rs. 72,610-12-0. On 6th March, 1947, defendant No. 1 deposited in Court a sum of Rs. 3,215 and put in a petition under section 47 and Order 21, rule 2, Civil Procedure Code, praying that the amount deposited by him together with the payments already made by defendants 2 to 7 completely wiped off the amount due under the decree as scaled down by the High Court in favour of defendants 2 to 7; defendant No. 1 prayed that as the decree was one and indivisible, full satisfaction of the decree should be recorded exonerating the mortgaged property and also defendant No. 1 himself from any further liability in respect of the decretal debt. The position taken up by defendant No. 1 in substance was that the mortgage debt was one and indivisible and even though different amounts were mentioned as payable by two groups of defendants in the decree, the decree-holders were bound under the terms of the decree to release the entire mortgaged property even on payment of the amount directed to be paid by defendants 2 to 7. This contention of defendant No. 1 was negated by the District Judge, but was accepted by the High Court on appeal which allowed the application of defendant No. 1 and directed that the Court below should enter full satisfaction of the mortgage decree. The decree-holders then come up to this Court in appeal (C.A.No. 32 of 1950) and the judgment of this Court is reported in *V. Ramaswami Ayyangar and others v. T.N.V. Kailasa Thevar*¹.

1. (1951) S.C.J. 278 : (1951) 1 M.L.J. 560 : (1951) S.C.R. 292.

This Court held that though the general law undoubtedly is that a mortgage decree is one and indivisible, exceptions to the rule are admitted in special circumstances where the integrity of the mortgage has been disrupted at the instance of the mortgagee himself. This Court further held that there was nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors while as regards the others the decree was kept intact; the principal Act was a special statute which aimed at giving relief not to debtors in general but only to a specified class of debtors, namely, those who are agriculturists as defined by the Act and to this extent it trenchanted upon the general law. The result of the decision of this Court was that the decree stood unscaled as against the 1st defendant. When the appeal in the Supreme Court was pending, the amending Act of 1948 was enacted and it came into force on 25th January, 1949. We shall presently read the provisions of this amending Act. On the strength of these provisions defendant No. 1 made an application again to scale down the decretal debt. This was application No. 79 of 1950. It was this application which the learned District Judge held to be unsustainable in law. On an appeal, the High Court held that the application was sustainable and an enquiry should be made whether defendant No. 1 is an agriculturist within the meaning of the principal Act. The present appeal is directed against this order of the High Court.

Now before we proceed to consider the questions which arise in this appeal it is necessary to set out the relevant provisions of the principal Act and the amending Act of 1948 of which defendant No. 1 (respondent No. 1 herein) claims the benefit. We must first read section 19 of the principal Act. That section is in these terms :

"19. (1) Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be :

Provided that all payments made or amounts recovered, whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor.

(2) The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement." It is worthy of note that section 19 as it originally stood in the principal Act was re-numbered as sub-section (1) of section 19 and sub-section (2) was added by section 10 of the amending Act of 1948. We may also set out here section 16 of the amending Act of 1948. That section is in these terms:

"16. The amendments made by this Act shall apply to the following suits and proceedings, namely :—

- (i) all suits and proceedings instituted after the commencement of this Act ;
- (ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before such commencement ;
- (iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act :

Provided that no creditor shall be required to refund any sum which has been paid to or realised by him, before the commencement of this Act."

Respondent No. 1 claimed that he was entitled to the benefit of sub-section (2) of section 19 read with clause (iii) of section 16 of the amending Act of 1948. The learned District Judge negatived this claimed on the following three grounds :

(i) He held that in O.S. No. 30/1934 the preliminary decree was originally passed on 15th May, 1937 and the final decree on 28th January, 1938 and both these dates were anterior to the coming into force of the principal Act. The principal Act, it may be stated here, came into force on 22nd March, 1938. Therefore sub-section (2) of section 19 did not apply to the present case.

(ii) Secondly, he held that sub-section (2) of section 19 applied to those cases only where there was a debt payable on the date of the commencement of the principal Act ; in the present case, however, there was no debt payable on the

date of the commencement of the principal Act, the debt having ripened into a decree ; therefore sub-section (2) of section 19 was not applicable.

(iii) Thirdly, he held that the claim of defendant No. 1 to have the decree against him scaled down having been decided against him by the District Judge in I.A. No. 104 of 1942 on 25th February, 1943 and the same claim having been negatived by the High Court in subsequent proceedings, it was not open to defendant No. 1 to make a fresh claim under sub-section (1) of section 19 because though sub-section (1) of section 19 used the expression "notwithstanding anything contained in the Code of Civil Procedure", that expression related to the provisions of the Code in the matter of amendment of decrees and entering of satisfaction of decree but did not include the principle of *res judicata*, a principle which is more general and comprehensive in character than what is laid down in section 11 of the Code.

The High Court apparently proceeded on the footing that the present case was one in which a decree had been passed after the commencement of the principal Act and therefore sub-section (2) of section 19, added by the amending Act of 1948, applied. The High Court said that no serious attempt was made before it on behalf of the decree-holders to support the view of the learned District Judge that the debt in the present case was not a debt within the meaning of the principal Act because it had ripened into a decree prior to the commencement of the principal Act. The High Court then referred to section 16 of the amending Act and held that defendant No. 1 was entitled to the benefit of sub-section (2) of section 19 read with clause (iii) of section 16 of the amending Act, 1948 and the circumstance that the claim of defendant No. 1 to the benefits of the principal Act prior to its amendment in 1948 had been negatived by the District Judge and the High Court did not deprive him of the new right which the amending Act had given him provided he was able to prove that he was an agriculturist within the meaning of the principal Act.

Learned counsel on behalf of the appellants has argued before us that the view expressed by the High Court is not correct. He has contended that the present case does not come under sub-section (2) of section 19 because this was a case in which a decree was passed for the repayment of a debt before the commencement of the principal Act, namely, before 22nd March, 1938. He has pointed out that so far as defendant No. 1 is concerned, a preliminary decree was passed against him on 15th May, 1937 and a final decree on 28th January, 1938. He has also referred us to the decree passed in the High Court on 25th March, 1942. In clause (6) of that decree it was stated that so far as defendant No. 1 was concerned the direction made by the learned District Judge in the decree passed on 15th May, 1937 would stand confirmed. Therefore, the argument before us is that the only provision of which defendant No. 1 was entitled to claim benefit is section 19 as it stood before its amendment in 1948 which applied to cases where a decree was passed before the commencement of the principal Act and inasmuch as the claim of defendant No. 1 under that provision had been negatived both by the District Judge and the High Court on previous applications made by defendant No. 1, it was not open to him to make fresh claim under the same provision. Learned counsel has also submitted that the provisions of the amending Act, 1948 have no application in the present case and therefore no new right has been given to defendant No. 1.

The crucial point for decision in connection with the arguments stated above is whether the decree in the present case is a decree passed before the commencement of the principal Act or after its commencement. It is indeed true that the District Judge passed a preliminary decree on 15th May, 1937 and a final decree on 28th January, 1938. These decrees, however, were superseded by the preliminary decree which the High Court passed on 25th March, 1942. As this Court pointed out in *Ramaswami Ayyangar's case*¹, a preliminary decree was drawn up in accordance with the judgment of the High Court by which the amount due from defendants 2 to 7 was scaled down while so far as defendant No. 1 was concerned,

1. (1951) S.C.J. 278 : (1951) 1 M.L.J. 560 : (1951) S.C.R. 292.

the decree of the trial Judge was affirmed subject to a slight modification regarding the rate of interest. The decree passed on 25th March, 1942 was a preliminary decree inasmuch as it directed that in default of the payment of the amounts directed to be paid by the decree, the mortgaged properties would be sold. When no payments were made as directed by the preliminary decree of the High Court, a final decree in terms of the same was passed by the District Judge himself on 25th September, 1943. This was the decree which was put in execution. It is well settled that where an appeal has been preferred against a preliminary decree the time for applying for final decree runs from the date of the appellate decree; see *Jowad Hussain v. Gendan Singh*¹. In that decision the Privy Council quoted with approval the following observations of Banerjee, J. made in *Gajadhar Singh v. Kishan Jiwan Lal*²:

"It seems to me that this rule—the rule regulating application for final decree in mortgage actions—contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause."

The principle that the appellate order is the operative order after the appeal is disposed of, which is the basis of the rule that the decree of the lower Court merges in the decree of the appellate Court, has been approved by this Court in *The Collector of Customs, Calcutta v. The East India Commercial Co., Ltd., Calcutta and others*³. We are therefore of the view that the operative decree in the present case was the preliminary decree made by the High Court on 25th March, 1942 which was made final on 25th September, 1943. That being the position, the present is a case to which sub-section (2) of section 19 is attracted as also the provisions of section 16 of the amending Act of 1948. Sub-section (2) of section 19 read with clause (iii) of section 16 entitles defendant No. 1 (respondent No. 1 herein) to claim the benefit of the principal Act, even though his earlier applications prior to the amending Act of 1948 were rejected. Sub-section (2) of section 19 read with section 16 creates a new right in favour of respondent No. 1 and that right cannot be defeated on the principle of *res judicata*. The true scope and effect of section 16 was considered by this Court in *Narayanan Chettiar v. Annamalai Chettiar*⁴. Referring to clause (iii) of section 16 this Court said:

"Clause (iii), it seems clear to us, applies to suits and proceedings in which the decree or order passed had become final, but had not been executed or satisfied in full before 25th January, 1949, this means that though a final decree or order for repayment of the debt had been passed before 25th January, 1949, yet an agriculturist debtor can claim relief under the Act provided the decree has not been executed or satisfied in full before the aforesaid date. It should be remembered in this connection that the word 'debt' in the Act has a very comprehensive connotation. It means any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue Court of otherwise, etc. It is, therefore, clear that the word 'debt' includes a decretal debt."

In the case before us clause (iii) of section 16 clearly applies because the final decree which was passed on 25th September, 1943 had not been satisfied in full before the commencement of the amending Act, 1948, that is, before 25th January, 1949. Therefore, by reason of clause (iii), of section 16 of the amending Act of 1948 respondent No. 1 was entitled to the benefit of sub-section (2) of section 19, and he cannot be deprived of that benefit because prior to the new right given to him by the amending Act of 1948 his applications for getting relief under the principal Act had been rejected.

We have, therefore, come to the conclusion that the view expressed by the High Court is the correct view and respondent No. 1 is entitled to the benefit of sub-section (2) of section 19 read with clause (iii) of section 16 of the amending Act of 1948, provided he establishes that he is an agriculturist within the meaning of the principal Act. The appeal therefore fails and is dismissed with costs.

K.S.

Appeal dismissed.

1. L.R. 53 I.A. 197 : 51 M.L.J. 781 : A.I.R. 1926 P.C. 93.

2. I.L.R. 39 All 641.

3. A.I.R. 1963 S.C. 1124.

4. (1959) S.C.J. 788 : (1959) 2 M.L.J. (S.C.) 55 : (1959) 2 An.W.R. (S.C.) 55 : (1959) Supp. 1 S.C.R. 237.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

The Akola Electric Supply Co. (P.), Ltd.

.. Appellant*

v.

J. N. Jarare and others

.. Respondents.

Industrial dispute—Gratuity scheme—If can be imposed on an industry which had already ceased to carry on its business or is about to close down.

Provision for gratuity scheme is not based on any statutory enactment, but has been evolved by industrial adjudication as a step to achieve social justice. In doing so, industrial adjudication has proceeded on the basis that only a small percentage of the workmen retire in any particular year and so the provision for paying gratuity to retiring workmen would ordinarily be not an unreasonable burden for the employer to be asked to bear.

The position is materially altered however when the industry is expected to close in the immediate future, or has already closed. In such a case the entire body of workmen will be 'retriring' at one and the same time so that in substance, though not in the name, the provision of gratuity would be equivalent to the grant of retrenchment compensation, in addition to what is provided for in the statute. There is no justification for this in the principles of social justice.

Accordingly the framing of a gratuity scheme by an Industrial Tribunal when an industry is on the verge of closure or after it has closed is wholly unjustified and has to be set aside.

Appeal by Special Leave from the Award, dated 29th April, 1961, of the State Industrial Court at Nagpur in Industrial Reference No. 13 of 1959.

M. C. Setalvad, Senior Advocate (Vallabhdas Mehta and Sardar Bahadur, Advocates, with him), for Appellant.

S. A. Sohoni, Shanti Swarup Khanduja, Lalit Kumar and Ganpat Rai, Advocates, for Respondents.

The Judgment of the Court was delivered by

Das Gupta, J.—This appeal by Special Leave is against an award of the Industrial Court at Nagpur under section 38 (a) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, dated 29th April, 1961. By an earlier award dated 4th December, 1959, the Industrial Court ordered the payment of gratuity to the employees of the appellant Company on certain rates. The award was to come into force from 4th December, 1959. On an application by the Company under Article 227 of the Constitution, the Nagpur High Court set aside the Industrial Court's order and remanded the matter for reconsideration of the question after examining the financial condition of the Company. After remand the Industrial Court took evidence of both parties as regards the financial condition of the Company and came to the conclusion that the Company was in a very sound financial position and could easily bear the burden of payment of gratuity to the extent of Rs. 50,000 or even more. Accordingly, the Industrial Court made a fresh award directing the payment of gratuity to the Company's employees at the rate of 1/2 month's average wage—the average wage to be calculated for the period 1st December, 1958 to 30th November, 1959 to every employee who had to his credit uninterrupted continuous service of not less than five years on termination of his service, except by dismissal on account of misconduct. The award was directed to come into force from 29th April, 1961.

The Appellant Company was a licensee for supplying electric energy to the public within the area approximating to the Municipal limits of Akola. The licence expired on 6th December, 1959. Prior to this the State Electricity Board had by a notice, dated 27th November, 1957 intimated its intention to exercise its option to purchase the undertaking on the expiry of the licence. It was after this notice had been served and it was known that the Company would be closing its busi-

ness on 6th December, 1959 that the claim for gratuity in respect of which the Industrial Court has made its award, was first made. Indeed, the very application for referring this and other disputes for arbitration contained the frank statement that it was in view of the impending closure of business that the claim for gratuity was being made. It is interesting to notice that the earlier award by the Industrial Court was made only two days before the Company's licence expired and the business was taken over by the Bombay Electricity Board. The award now under appeal was made more than a year after the Company had closed its business.

The main contention urged before us in support of the appeal is that the Tribunal was not justified in imposing on the Company a gratuity scheme at a time when it had already ceased to carry on its business. It is argued that gratuity schemes are planned on a long-term basis, the ruling principle being to make the employer to pay retiral benefits to such of its employees as retire from year to year. The framing of a gratuity scheme when an industry is on the verge of closure or after it has closed is, it is urged, wholly unjustified. In our opinion, there is considerable force in this contention.

It has been laid down by this Court that the statutory provision for payment of retrenchment compensation is no bar to the framing of a gratuity scheme. The question was fully considered by this Court in *Indian Hume Pipe Co. v. Its Workmen*¹, where this Court pointed out that while gratuity is intended to help workmen after retirement to whatever cause the retirement may be due to, retrenchment compensation is intended to give relief for the sudden and unexpected termination of employment by giving partial protection to the retrenched person and his family to enable them to tide over the hard period of unemployment. It has also been held by this Court in the *Bharatkhand Textile Mfg. Co., Ltd. v. Textile Labour Assn.*² that the existence of a Provident Fund Scheme is also no bar to the provision of further retiral benefit by way of gratuity scheme.

Learned counsel for the respondent seems to think that these cases some-how supported his contention that the fact that an industry is going to close or has actually closed is no bar to a framing of gratuity scheme for its employees. We are unable to see however anything in these decisions of this Court to assist such a plea. In neither of these cases nor in any other case that we know of had this Court to consider the question of a gratuity scheme in an industry which is going to close in the near future or has already been closed. Indeed, we know of no case in which an Industrial Tribunal has ever framed a gratuity scheme for an industry which was not expected to carry on or has ceased to carry on its business. In all the cases that have come before Industrial Tribunals or this Court, gratuity schemes asked for or allowed have been in industries which were expected to carry on for a fairly long time. One of the important factors which requires consideration in deciding on the propriety of a scheme of gratuity is the ability of the industry to bear the additional financial burden and in deciding this question it has been repeatedly pointed out, the burden from year to year has to be considered after taking into account the average number of retirements likely to take place in a year. Thus in the *Bharatkhand Textile Mfg. Co. Case*², this Court in discussing the considerations that arise in such matters, said :—

“.....there can be no doubt that before framing a scheme for gratuity industrial adjudication has to take into account several relevant facts ; the financial condition of the employer, his profit-making capacity, the profits earned by him in the past, the extent of his reserves and the chances of his replenishing them as well as the claims for capital invested by him, these and other material considerations may have to be borne in mind in determining the terms of the gratuity scheme. It appears also to be well recognised that though the grant of a claim for gratuity must depend upon the capacity of the employer to stand the burden on a long-term basis it would not be permissible to place undue emphasis either on the temporary prosperity or the temporary adversity of the employer. In evolving a long-term scheme a long-term view has to be taken of the employer's financial condition and it is on such a basis alone that the question as to whether a scheme should be framed or not must be decided.....”

1. (1960) S.C.J. 550 : (1960) 2 S.C.R. 32.

2. (1960) 3 S.C.R. 329.

These observations emphasise the position that gratuity schemes are always made in the expectation of the industry continuing to function for a long time to come.

It has to be noticed that the provision for gratuity scheme is not based on any statutory enactment ; but has been evolved by industrial adjudication as a step to achieve social justice. In doing so, industrial adjudication has proceeded on the basis that only a small percentage of the workmen retire in any particular year and so the provision for paying gratuity to retiring workmen would ordinarily be not an unreasonable burden for the employer to be asked to bear.

The position is materially altered however when the industry is expected to close in the immediate future, or has actually closed. In such a case the entire body of workmen will be "retiring" at one and the same time so that in substance, though not in name, the provision of gratuity would be equivalent to the grant of retrenchment compensation, in addition to what is provided for in the statute. We can find no justification for this in the principles of social justice.

We have therefore come to the conclusion that the Industrial Court acted wrongly in directing any gratuity to be paid by the Company to its employees.

We accordingly allow the appeal, and set aside the award made by the Industrial Court. There will be no order as to costs.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Sube Singh and another

*Appellants**

v.

Kanhiya Singh and others

Respondents.

Custom—Punjab—Jats of Jhajjar Tehsil in Rohtak District—Power of holder of ancestral agricultural land to transfer for consideration is unlimited.

A Jat holding agricultural ancestral land in Jhajjar Tehsil in Rohtak District had unrestricted power to transfer the land for consideration provided of course the transfer was not for immoral purposes. No distinction can be made between a sonless holder and a holder having a son.

Appeal by Special Leave from the Judgment and Decree, dated 17th February, 1960 of the Punjab High Court in regular First Appeal No. 190 of 1953.

Shiv Charan Singh and Janardan Sharma, Advocates, for Appellants.

Achhru Ram, Senior Advocate (Brijbans Kishore, Advocate, with him), for Respondents Nos. 1 to 3.

The Judgment of the Court was delivered by

Sarkar, J.—The appellants are the sons of Umed Singh, one of the respondents in this appeal. They filed a suit for a declaratory decree that the sale of certain lands by their father Umed Singh, was void against them and the other reversionary heirs. The contesting respondents are the purchasers of the lands from the father.

It is not in dispute that the lands are ancestral and that the parties are Jats of Jhajjar Tehsil in Rohtak District. The only question is as to the existence of a custom giving a Jat, holding agricultural ancestral lands in Jhajjar Tehsil in District Rohtak in Punjab, free power to transfer them for consideration.

The trial Court and the High Court of Punjab in first appeal, held that there was such customary power. Indeed, in view of the large number of decisions in which it has been consistently held that a sale or mortgage of ancestral land by a

holder is not liable to be set aside at the instance of his sons or other reversionary heirs, unless the transaction was for immoral purposes, it is impossible to take any other view.

We were referred to over a dozen cases and we are sure there are more. The earliest of these was decided in 1913 and the latest in 1936. Excepting in one case to which we shall later refer, nowhere has it been held that the transfer by way of a sale or mortgage of ancestral property by a holder is liable to be set aside at the instance of a son or a reversionary heir unless the transaction had been for immoral purposes. The present is not a case of that kind for though the appellants alleged that the sale was for immoral purposes it has been found that it was not so. We may refer here to some of these cases: *Telu v. Chuni*¹, *Giani v. Tek Chand*², *Behari and others v. Bhola and others*³, *Abdul Rafi Khan v. Lakshmi Chand*⁴, *Ram Datt v. Khushi Ram*⁵, *Pahlad Singh v. Sukhdev Singh*⁶, *Sohan Lal v. Rati Ram*⁷, and *Suraj Mal v. Birju*.⁸

Learned counsel for the appellants contended that none of these cases dealt with the custom existing in Jhajjar Tehsil and, therefore, they could not be authorities on which the present case could be decided. We have first to observe that this statement is not correct for the case of *Pahlad Singh v. Sukhdev Singh*⁶, dealt with the custom in Jhajjar Tehsil. That appears from the judgment of the District Judge in that case which is Exhibit D-5 in this case. Furthermore, we notice that many of the cases to which we have earlier referred treated the custom giving the holder unrestricted right to transfer ancestral property for consideration, as existing in the whole district of Rohtak: see for example, *Telu v. Chuni*¹, and *Sheoji v. Fajar Ali Khan*⁹. It also appears from the *Riwaj-i-am* for Rohtak District recorded in Joseph's Customary Law Manual, volume XXIII, page 50, compiled at the settlement of 1909 that "the power of alienating for consideration is far wider than in the Punjab proper." In view of all this we think the Courts below were not in error in holding that the Jats of Jhajjar Tehsil in Rohtak District had unrestricted power to transfer land for consideration provided of course the transfer was not for immoral purposes.

Learned counsel for the appellant then contended that most of the cases on which the respondents relied were cases of sonless holders and even if these cases were rightly decided, those which recognised unrestricted power in the case of a holder having a son were not justified by the *Riwaj-i-am* entries and should not be followed.

We are unable to accept this contention. We find nothing in the *Riwaj-i-am* entries which would show that the decisions were not justified. In Joseph's Manual it is said that "a sonless proprietor has full power to alienate his property, by sale or mortgage even if there is no necessity". It is true that it has also been said there that "whether a proprietor with sons has the same power is a more doubtful case". In spite of this, however, the Courts have since 1913 consistently held that the power of a holder even where he has sons to alienate ancestral property for consideration is unrestricted. It is not now possible nor would it be right to upset the law settled by these decisions on the slender ground of the doubt expressed in Joseph's Manual. In Tupper's Statements of Customary Law, vol. 2, dealing with Rohtak District, it has been said at page 178 that "it is quite common for people to sell or mortgage their land. In cases of sale, the right of pre-emption is observed." (paragraph 25). This statement makes no distinction between the case of a man with a son and one without a son. We find nothing in the records of custom to which our attention has been drawn to justify the view that the case of the holder of ancestral property having a son is different in this regard from that of a holder without one. Furthermore, it would be strange if the existence of sons made any difference, that the point was not noticed in any of the very large number of cases

1. 231 P.L.R. 1913.
2. (1923) I.L.R. 4 Lah. 111.
3. (1933) I.L.R. 14 Lah. 600.
4. (1935) I.L.R. 16 Lah. 505.
5. A.I.R. 1935 Lah. 692.
6. A.I.R. 1938 Lah. 524.

7. Regular Second Appeal No. 136 of 1943 (unreported) Patn. H.C.
8. Civil Regular second Appeal No. 693 of 1952 (unreported) H.C.
9. 230 P.L.R. 1913.

dealing with the custom. We think that there is a great deal to be said in favour of the contention of Mr. Achhru Ram that the restriction on the power to alienate where it exists is based on the agnatic theory and, therefore, no distinction can be made between a sonless holder and a holder having a son : see *Gujar v. Sham Das*¹.

We come now to the only case which takes a different view and on which the appellant naturally laid great stress, namely, *Budal v. Kirpa Ram*². That was a case of a sonless holder. It was held that among Jats in the Rohtak District there was no unlimited power in holders of ancestral property to alienate it. This case has however not been followed in any of the subsequent decisions and in most cases its authority has been discounted. That we think is enough to prevent us at this distance of time from reviving the view taken in that case. Furthermore, as was pointed out, this case does not refer to the earlier authorities, for example, *Telu v. Chuni*³. The only authority to which it refers is Tupper's Customary Manual, but the view expressed there was not accepted as sufficient authority because in the introduction Tupper said (p. 173), that Mr. Purser who gave him the paper 'from which he prepared his record' did not consider that it can be relied on in 'doubtful points'. This is hardly any reason for there was nothing to show that the customary power was doubtful. It would thus appear that the decision in *Budal v. Kirpa Ram*² was not a satisfactory one.

In this view of the matter we think that the learned Subordinate Judge and the High Court came to the correct conclusion that in Jhajjar Tehsil a Jat holder had unrestricted power to alienate his ancestral land for a consideration.

The appeal is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Behari Mills and another

*.. Appellants**

v.

The Ahmedabad Municipal Corporation

.. Respondent.

Bombay Town Planning Act (XXVII of 1955) (as applied to Gujarath), section 90—Repeal of Bombay Act (I of 1915) and savings of orders thereunder—Scope and effect.

It is clear that the saving clause (section 90 of Bombay Town Planning Act XXVII of 1955) was effective to continue the appointment of the Arbitrator made under the repealed Act (Bombay Act I of 1915), and also to keep alive the proceedings before him. But the proposals made by him had to be dealt with by the Tribunal of Arbitration, which was not constituted by the saving clause. The Board of Appeal constituted under section 35 of the 1955 Act was competent to deal with any decision of the Town Planning Officer, but the Arbitrator under the old Act did not *ipso facto* become, without an express order of the Government appointing him, a Town Planning Officer, and any decision or order of the Government appointing him a Town Planning Officer, and any decision or order by the Arbitrator would not have the effect of an order of the latter.

Appeals against the order of the Arbitrator as such did not lie to the Board of Appeal and therefore, the Board was incompetent to deal with them and orders purported to have been passed by the Board on such appeals are with out jurisdiction.

[In Maharashtra State, Act (XXIV of 1960) removed the lacuna.]

Appeals by Special Leave from the Judgment and Order, dated 23rd January, 1959 of the Board of Appeal constituted under the Bombay Town Planning Act (XXVII of 1955), in Tribunal Appeals Nos. 140 and 87 of 1958.

G. P. Pai, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellants (In both the Appeals).

S. T. Desai, Senior Advocate (I. N. Shroff, Advocate, with him), for Respondent (In both the Appeals).

1. 107 P.R. 1887.

2. 67 P.R. 1914.

* C.As. Nos. 133 and 134 of 1962.

3. 231 P.L.R. 1913.

The Judgment of the Court was delivered by

Sinha, C.J.—These two consolidated appeals, by Special Leave, raise the question of the interpretation of certain provisions of the Bombay Town Planning Act, 1954 (Bombay Act XXVII of 1955)—which hereinafter will be referred to as the Act, with particular reference to the scope and effect of section 90 of the Act, whereby the Bombay Town Planning Act (Bombay Act I of 1915) was repealed, and certain orders of the State Government saved from the effect of the repeal.

It appears that the Ahmedabad Municipal Borough, which was replaced by the Ahmedabad Municipal Corporation—the sole respondent in these appeals and which hereinafter will be referred to as the Borough and the Corporation respectively—declared its intention by a resolution dated 1st October, 1941, to promulgate a scheme under the Act of 1915 in respect of the area known as Khokhara-Mehmedabad. The said Scheme was in due course sanctioned by the Government of Bombay on 14th July, 1942. Under that Act an arbitrator was appointed in respect of the said Scheme, as required under the Act. Shri R.N. Parikh was eventually appointed the Arbitrator under the Act. He finalised the Scheme under the Act of 1915. The Borough was converted into the Ahmedabad Municipal Corporation under the Bombay Provincial Municipal Corporation Act of 1949 with effect from 1st July, 1950. The Act of 1915 was repealed by the Act which came into force from 1st April, 1957. The said Arbitrator notified to the appellants a memorandum dated 28th March, 1958, extracting his decision in respect of the said Scheme, in so far as it affected the appellants. The Government of Bombay constituted a Board of Appeal under the Act, consisting of three persons whom it is not necessary to specify. The appellants filed two appeals against the award of the said Arbitrator. The said Board of Appeal heard the appellants' appeals, as also appeals by other persons, in all 151 appeals, in respect of the said Scheme. It is from the decision, dated 23rd January, 1959 of the said Board of Appeal that the appellants have appealed to this Court, on obtaining Special Leave.

Section 30 of the Act of 1915 lays down the duties of the Arbitrator in some detail, running into ten clauses, and a number of sub-clauses. The decision of the Arbitrator, except on matters covered by sub-sections (3-A), (3-B), (3-C), (4), (6) and (9) of section 30 has been declared by section 31 to be final. The matters in respect of which his decision has not been declared to be final, as aforesaid, the Arbitrator's conclusions have been characterised as proposals by section 32 of the Act of 1915, and those matters were to be submitted to the Tribunal of Arbitration, constituted under section 33 (1), for its decision. It would thus appear that on certain matters which came under the purview of the Arbitrator's powers, the decision of the Arbitrator was final, and in other matters they were merely proposals to be submitted for the decision of the Tribunal of Arbitration. When the Act of 1915 was repealed by the Act, it saved certain orders and proceedings by section 90, which will be set out and discussed later. Under the Act, section 31 contemplates the appointment of a Town Planning Officer, who is a substitute of the Arbitrator under the Act of 1915. Section 32 lays down in great detail the duties of the Town Planning Officer, which may be equated with section 30 of the Act of 1915. Section 33 declares certain decisions except under section 32 (1), clauses (v), (vi), (viii), (ix), (x) and (xiii), of the Town Planning Officer to be final and conclusive and binding on all persons, while decisions of the Town Planning Officer, under the above clauses, are subject to appeal to the Board of Appeal, under section 34, to be constituted under section 35. It will thus appear that the Act has equated the Arbitrator under the Act of 1915 with the Town Planning Officer and the Tribunal of Arbitration with the Board of Appeal. Though under the former Act the Arbitrator is a part of the Tribunal of Arbitration, under the Act certain decisions of the Town Planning Officer are appealable to the Board of Appeal. It is common ground that Shri Parikh, the Arbitrator under the Act of 1915, has not been, in terms, appointed the Town Planning Officer under the Act.

After setting out the relevant provisions of the Act of 1915 and the Act, it is necessary to state that the decision given by the Arbitrator, Shri R.N. Parikh,

functioning under the Act of 1915, could be reviewed by the Tribunal of Arbitration, but as there was no such tribunal in existence on and after that date, the appellants preferred appeals to the Board of Appeal, constituted under the Act. Those appeals were disposed of by the Board by its order dated 23rd January, 1959. It is the legality of that order that is in question before us.

It is submitted on behalf of the appellants that they preferred their appeals to the Board, which was the only appellate authority in existence, and which mistakenly they were advised to be the competent tribunal to deal with the appeals. It was further argued that on a true construction of the provisions of the Act and the Act of 1915, it is clear that the Board of Appeal had no jurisdiction to render any judgment in respect of the decisions or proposals of the Arbitrator. In our opinion, this contention is well-founded. Reliance was placed in this connection on the provisions of section 90 of the Act, the relevant portions of which may be set out below :

“(1) The Bombay Town Planning Act, 1915, is hereby repealed.

(2) Notwithstanding the repeal of the said Act.....any appointment made of an arbitrator, any proceedings pending before the arbitrator.....under the repealed Act shall, in so far as it is not inconsistent with this Act, continue in force thereunder and provisions of this Act shall have effect in relation to such.....proceedings.....”

It is clear that the saving clause was effective to continue the appointment of the Arbitrator made under the repealed Act, and also to keep alive the proceedings before him. But the proposals made by him had to be dealt with by the Tribunal of Arbitration, which was not continued by the saving clause, aforesaid. The Board of Appeal constituted under section 35 of the Act was competent to deal with any decision of the Town Planning Officer, but the Arbitrator under the old Act did not *ipso facto* become, without an express order of the Government appointing him, a Town Planning Officer ; and any decision or order by the Arbitrator would not have the effect of an order by the latter. That lacuna does not appear to have been removed by any subsequent legislation or order of the Government of Gujrat, under the Act. Some lacunæ were discovered in the working of the Act and the Government of Maharashtra came out with the Bombay Town Planning (Amendment and Proceedings Validation) Act, 1960 (Maharashtra Act XXIV of 1960). By section 2, sub-section (4) of this Act, it has been provided that “reference to Town Planning Officer in this Act shall include reference to an arbitrator whose appointment is continued in force under sub-section (2)”, set out above. No such action was taken by the Government of Gujrat, nor any validating Act passed by the Gujrat Legislature. It is thus manifest that the appeals preferred by the appellants against the order of the Arbitrator as such did not lie to the Board of Appeal, and, therefore, the Board was incompetent to deal with them, with the result that the orders purported to have been passed by the Board on those appeals are without jurisdiction. We need not go into the further question as to the effect of the orders of the Arbitrator which had been challenged by the appellants as it now appears without effect.

In the result, these appeals are allowed. But in view of the fact that the appellants themselves were at least partly responsible for making those infructuous appeals, there will be no order as to costs in this Court.

K.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Innamuri Gopalam and Maddala Nagendrudu and others .. *Appellants**

v.

The State of Andhra Pradesh and another .. *Respondents.*

Andhra Pradesh General Sales Tax Act (VI of 1957), section 9 (1)—Notification under of 13th December, 1957 exempting certain goods from sales tax—Scope.

If the tax-payer is within the plain terms of the exemption (granted by a notification of 13th December, 1957 under section 9 (1) of the Andhra Pradesh General Sales Tax Act, 1957, in the instant case) he cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. The exception in the proviso to the notification in respect of "any class of goods in respect of which additional duties of excise are leviable by the Central Government under clause 3 of the Additional Duties of Excise (Levy and Distribution) Bill, 1957" is not applicable where textiles are not within a factory, warehouse, etc., but with a dealer. If in respect of a class of goods such duties are not leviable because of the situs in which they are lying or are stocked, they would not be the class of goods in respect of which duties of excise are leviable. The operation of the exemption is therefore unaffected by the proviso to the notification in the instant case and the appellants were accordingly entitled to the relief from sales tax granted by the Notification.

Appeal by Special Leave from the Judgment and Order dated 18th January, 1961 of the Andhra Pradesh High Court in Writ Petition No. 101 of 1959.

N. C. Chatterjee, Senior Advocate (*A. N. Sinha* and *A. K. Nag*, Advocates, with him), for Appellants.

A. Ranganathan Chetty, Senior Advocate (*P. D. Menon*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The proper construction and legal effect of a notification under section 9 (1) of the Andhra Pradesh General Sales Tax Act, 1957 (Andhra Pradesh Act VI of 1957) which for shortness we would call the Act, is the principal question that arises for consideration in this appeal by Special Leave in which the correctness of the decision of the High Court dismissing a Writ Petition filed by the appellants is challenged.

Section 5 of the Act is the charging section under which dealers are liable to pay sales tax on their turnover. Under sub-section (3) (a) of this section, read with Schedule II to the Act cotton textile goods which was the commodity in which the appellants were dealing, were liable to tax at a single point. Section 9 of the Act enabled the State Government to exempt the tax leviable under the Act. In exercise of the power thus conferred a notification was issued on 13th December, 1957, which read :

"In exercise of the powers conferred by sub-section (1) of section 9 of the Andhra Pradesh General Sales Tax Act, 1957 (Andhra Pradesh Act VI of 1957) (hereinafter referred to as the said Act), the Governor of Andhra Pradesh hereby exempts from the tax payable under the said Act, with effect on and from the 14th December, 1957, the sale or purchase of any of the goods appended hereto :

Provided that in the case of any class of such goods in respect of which additional duties of excise are leviable by the Central Government under clause 3 of the Additional Duties of Excise (Levy and Distribution) Bill, 1957, read with section 4 of the Provisional Collection of Taxes Act, 1931 (Central Act XVI of 1931), the exemption shall be subject to the following conditions, namely :—

(1) The dealer shall prove to the satisfaction of the assessing authority that additional duties of excise have been so levied and collected on such goods by the Central Government, in default of which the dealer shall be liable to pay the tax under the said Act in respect of such goods.

(2) Any dealer who is so liable to pay the tax may, at his option, pay, in lieu thereof a lump sum by way of compensation determined in the manner specified in condition (3).

.....".

As nothing turns on the terms of condition (3) with which the Notification ends it is not set out. The appendix which is referred to in the opening paragraph has three clauses the first of which is the only material one and this runs :

"1. All varieties of textiles, *viz.*, cotton, woollen or silken including rayon, art silk or nylon, whether manufactured by handloom, powerloom or otherwise ;"

Pausing here, it is necessary to set out the terms of clause 3 of the Additional Duties of Excise Bill, 1957, which is referred to in the proviso to the opening paragraph of the notification. Though the Bill was later passed into law and became an Act, we shall refer to the Bill conformably to the phraseology of the notification. Clause 3 (1) which is the relevant portion of that clause reads :

"3. (1) There shall be levied and collected in respect of the following goods, namely, sugar, tobacco, cotton fabrics, rayon or artificial silk fabrics and woollen fabrics produced or manufactured in India and on all such goods lying in stock within the precincts of any factory, warehouse or other premises where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto, duties of excise at the rates specified in the First Schedule to this Act."

How the matter came before the High Court was briefly this. There was no dispute that the appellants were and are doing business in the purchase and sale of textile goods. They claimed exemption from the payment of sales tax in respect of goods in stock with them on 14th December, 1957 relying on the notification set out earlier. The Sales Tax Authorities, however, rejected this claim and as a result a Writ Petition was filed in the High Court under Article 226 by the appellants praying for a direction for quashing the notice issued by the Sales Tax Department of the Government of Andhra Pradesh calling upon them to pay the sales tax on these goods. It is now necessary to mention that the validity of the action of the Sales Tax Officials—the Commercial Tax Officer, the second respondent,—making the demand was impugned by the appellants not merely on the ground that no tax was payable by them by reason of the above notification but also on various other grounds including the constitutional invalidity of the Sales Tax Act itself and in particular the provisions imposing sales tax on textile goods. The learned Judges dismissed their petition rejecting everyone of the contentions urged, and the appellants have come up in appeal after obtaining Special Leave. It must, however, be mentioned that the argument regarding the constitutional invalidity of the Act and the Rules were not repeated before us and the only point arising for consideration is as regards the construction of the notification.

Before proceeding further it would be convenient to set out the grounds on which the learned Judges held that the appellants were not within the benefit of the exemption conferred by the notification. The argument urged on behalf of the State Government as regards the construction of the notification and which was accepted by the learned Judges of the High Court, was briefly this. The exemption from payment of sales tax was granted in order to avoid double taxation *i.e.*, both the excise duty leviable by the Central Government under clause 3 of the Bill and sales tax to the State Government and it was claimed that this was made out by the terms of the proviso to the notification. In other words, the reasoning was that if the exemption provision contained in the first paragraph of the notification was to operate, the goods must have been such that it was liable to the tax under clause 3 (1) of the Bill and that where this condition was not satisfied the exemption provision had no application. It was admitted before the High Court that the textile goods in the possession of the appellants were not subject to excise duty or the additional excise duty under clause 3 (1) of the Bill. As no excise duty was leviable on these goods there was, of course, no question of the dealer being able to prove to the satisfaction of the assessing authorities under condition 1 of the proviso that additional duties had been levied and collected from him. Another and distinct line of argument was based on the use of the expression "any class of such goods" as distinguished from "any goods" occurring in the proviso and in regard to this the learned Judges observed :

“Textiles fall within the class of such goods in regard to which additional duties could be levied in certain contingencies. It does not mean that only such goods as are actually liable to be taxed by reason of section 3 of the abovementioned Central Act, that were intended to be covered by the proviso. If that were so, the expression ‘any class of such goods’ would be unmeaning. In our opinion, that clause only conveys the thought ‘goods belonging to the class’ in respect of which additional duties could be levied. That expression does not exclude goods set out in the appendix merely because they would not fall within the scope of section 3 of the Central Act.”

On these two lines of reasoning the learned Judges held that the appellants were not entitled to the benefit of the exemption and in consequence directed the dismissal of the Writ Petition. It is the correctness of this interpretation that is challenged before us.

Mr. Chatterjee—Learned counsel for the appellants submitted that on a plain reading of the notification the appellants were entitled to the benefit of the exemption if para. 1 stood alone. This submission has to be accepted and we heard no serious argument against it. The competence of the State Government to grant an exemption, whether qualified or unqualified, not being in dispute, the only question for consideration is whether the effect of the 1st paragraph of the notification has been qualified or modified by the rest of the notification including the conditions imposed thereunder. Learned counsel for the respondent relied on the same two lines of reasoning on which the High Court has decided the Writ Petition. He stressed before us in particular the argument based on the use of the words “any class of such goods” in the proviso.

The 1st paragraph of the notification grants an exemption which, if it stood alone, provides that no sales tax would be leviable on and from 14th December, 1957 on the sale or purchase of every variety of textiles. This, however, is subject to a proviso which undoubtedly cuts into and restricts the operation of the exemption clause and we have to determine the extent of the restriction of the area carved out. A plain and *prima facie* reading of the proviso without going into the distinction between goods and “class of goods” would appear to show that an exception is made in cases where additional duties of excise are “leviable” by the Central Government under clause 3 of the Bill. In such cases the conditions which follow the proviso have to be satisfied, *viz.*, that the additional duties of excise have to be proved to have been paid by the dealer in order to claim the benefit of the exemption. It is now common ground that no additional duty of excise was *leviable* in respect of the goods in the possession of the appellants and consequently there is no question of the appellants having to prove to the satisfaction of the assessing authorities that such duties had been levied and collected for them. This would be the plain reading of the section. Learned counsel for the respondent, however, repeated before us the argument which found favour with the learned Judges of the High Court based on the interpretation which he sought to place on the words “any class of such goods” in respect of which additional duties are leviable. Now, under clause 3 (1) of the Bill, learned counsel pointed out, additional duties of excise could be levied on cotton fabrics produced or manufactured in India and that it was only by reason of such goods not lying within the precincts of a factory, warehouse, etc. but with a dealer, that no such duty became leviable in the case of the goods with the appellants. The argument was that “textile goods” were “a class of goods” in respect of which an additional duty was *leviable*, though by reason of their location *viz.*, not being within the precincts of a factory, warehouse etc., no duty could be levied and that consequently unless condition 1 to the proviso was satisfied the exemption could not be claimed. The learned Judges accepted this argument, but with great respect to them, it appears to us that they were in error in doing so. In the first place, “the class of goods” referred to in the proviso to the notification are such that in respect of them duties of excise are leviable. If, therefore, in respect of a class of goods such duties are not leviable because of the situs in which they are lying or are stocked, they would not be the class of goods in respect of which duties of excise are leviable for the essential condition for the proviso to be brought into operation is the liability of the goods to the levy of the additional duty. It therefore appears to us that the expression “class of such goods” has to be understood as being a reference not merely to the

goods specified in the opening words of clause 3 (1) of the Bill but to such goods as fall within the entirety of that taxing provision and in respect of which therefore the additional duty would be leviable, for in respect of cotton fabrics produced in India *per se* or simpliciter no excise duty would be leviable unless they are at the premises which are specified in the latter portion of the clause 3 (1) of the Bill. Both these conditions are necessary to exist before the duty of excise is "leviable" and when the proviso therefore uses the words "any class of such goods" it could only refer to the class of goods named in the 1st paragraph of clause 3 (1) —lying stored or stocked in the places referred to in the concluding portion of the clause.

There is another aspect from which this question of construction could be viewed. It cannot be disputed that the proviso and the conditions appended thereto form an integral part thereof. It is obvious that where the proviso operates it would be open to the dealer affected by it to pay the additional duty and establish that he has paid such duty and thereby entitle himself to the exemption. In other words, it cannot be that the proviso excludes the exemption but in circumstances in which the conditions cannot be fulfilled. The conditions themselves would thus throw light upon the words of the proviso, and when the proviso is read with the conditions of which they are an integral part, the conclusion is inescapable that the word "leviable" used in the proviso means that in respect of the goods specified as regards which he claims exemption from the payment of sales tax there was a liability upon him to pay the additional excise duty under clause 3 of the Bill for it was only in that event that he would be able to prove to the assessing authorities that additional duty has been levied and collected from him.

Learned counsel for the respondent also repeated before us the other line of argument which the High Court accepted *viz.*, that the notification of Government in granting the exemption was to avoid double taxation, *viz.*, of liability to pay both the excise duty as well as the sales tax and that as in the present case the appellants were admittedly not bound to pay the additional excise duty they could make no claim to the benefit of the exemption either. We do not feel persuaded to accept this argument. No doubt, statutes have to be construed as a whole so as to avoid any inconsistency or repugnancy among its several provisions, but if there is nothing to modify, nothing to alter, or nothing to qualify the language of a statute, the words and sentences have to be construed in their ordinary and natural meaning (*vide* 36 Halsbury (3rd Edn.), section 585). What we are now concerned with is a fiscal provision and it has often been said that there is no equity in a taxing statute and either the subject is within it or not, on the words of the enactment or the rules validly made thereunder. In a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the words of the provision. If the tax payer is within the plain terms of the exemption he cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the statute or rule or by necessary implication therefrom, the matter is different, but that is not the position here. In this connection we might refer to the observations of Lord Watson in *Salomon v. Salomon & Co.*¹:

"Intention of the Legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary intendment."

Learned counsel for the State is possibly right in the submission that the object behind the framers of the notification was to avoid double taxation but the operation of an enactment or of a notification has to be judged not by the object which the Legislature or the notifying authority, as the case may be, may have had in mind but by the words which it has employed to effectuate the legislative intent. In the case

before us the operative words of the notification are to be found in the 1st paragraph granting the exemption and it was not disputed that the appellants were within that provision. The next question would be as to whether the exemption to which the appellants were manifestly entitled under the 1st paragraph of the notification they have been deprived of by the operation of the proviso. If the proviso on its proper construction, as we have endeavoured to point out earlier, cannot apply to cases where an additional duty of excise is not leviable under clause 3 of the Bill it would follow that the operation of the exemption is unaffected by the proviso. The appellants were therefore entitled to the relief from sales tax granted by the notification, dated 13th December, 1957.

In the Writ Petition which they filed to the High Court they prayed for a declaration that certain provisions of the Andhra Pradesh Act (VI of 1957) were *ultra vires* of the Constitution of India. As stated earlier, this point about the constitutional invalidity of the Act was abandoned in this Court and the argument before us was confined wholly to their claim to exemption under the notification.

The appeal is accordingly allowed and the order of the learned Judges dismissing the Writ Petition is set aside. The relief to which the appellants would be entitled would be, having regard to the fact that appellants failed in their attempt to impugn the constitutional validity of the Act, etc., a declaration that they are entitled to the benefit of the notification exempting them from the payment of sales tax in respect of textile goods in stock with them on 14th December, 1957 and restraining the respondents from levying or collecting sales tax from them in respect of such stock. As the appellants challenged unsuccessfully the constitutional validity of the Sales Tax Act before the High Court we do not consider that the order for costs passed by the learned Judges of the High Court should be interfered with. The appellants, however, will be entitled to costs in this Court.

K.S.

Appeal allowed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Subodh Gopal Bose

.. *Appellant **

v.

Ajit Kumar Haldar and others

.. *Respondents.*

Bengal Land Revenue Sales (West Bengal Amendment) Act (VII of 1950), sections 4 and 7—Scope and effect.

Section 4 of West Bengal Act (VII of 1950) grants relief to tenure holders even in respect of revenue sales held before that date, if the provisions of section 7 (which give retrospective operation to the substantive provisions of the Amending Act, which had extensively cut down the rigours of the old section 37) are attracted. Section 7 contemplates three kinds of cases, namely (1) a pending suit or proceeding for the ejectment of any person in respect of his tenure or leasehold irrespective of whether or not the lease was for purposes connected with agriculture or horticulture; (2) pending appeal or application for review or application for revision arising out of (1) above, the appeal or application being one by an unsuccessful plaintiff and not by an unsuccessful defendant, because the abatement contemplated by the section intended to close the door against an attack on pre-existing title and not against defence of such a title, and (3) a final decree or order made for ejectment. If a final decree for ejectment has been executed by delivery of possession of the land in question, before the commencement of the Amending Act the Legislature did not intend to reopen such closed transactions. Except those in all the categories (1) to (3) above, if the suit appeal, or proceeding could not have been validly instituted, preferred or made, in terms of the Amending Act, all those pending suits or appeals or applications would abate according to section 7 (1) (a) and the decree would become void according to section 7 (2). A pending appeal abates on the coming into force of the Amending Act.

Appeal from the Judgment and Decree, dated 16th June, 1958 of the Calcutta High Court in Appeal from Original Decree No. 144 of 1948.

B. Sen, Senior Advocate (S. N. Mukerji and R. R. Biswas, Advocates with him), for Appellant.

N. G. Chatterjee, Senior Advocate (*P. K. Ghosh*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Sinha, G. J.—The main question for determination in this appeal, on a certificate granted by the High Court of Calcutta, is the scope and effect of sections 4 and 7 of the Bengal Land Revenue Sales (West Bengal Amendment) Act (West Bengal Act VII of 1950) which hereinafter will be referred to as the Amending Act—which came into force on 15th March, 1950.

The suit out of which this appeal arises was instituted as long ago as 6th December, 1945, and has had rather a long and chequered career. The plaintiff, who, is the appellant in this Court, instituted the suit for ejectment of the defendants from the disputed property on the ground that he had annulled the defendants' interests whatever they were, under section 37 of the Bengal Land Revenue Sales Act (Central Act XI of 1859), by virtue of his auction purchase, on 6th January, 1936, of the entire revenue paying estate, Touzi No. 6 of the 24 Parganas Collectorate. After the auction purchase aforesaid, he obtained possession from the Collector in May-June, 1936, and thereafter annulled and avoided all intermediary interests except those protected under section 37 of Act XI of 1859, by appropriate notices, in or about June, 1936. The land in dispute was described in the plaint as Mal land of the said Touzi and other Touzies and the plaintiff asked for *Khas* possession to the extent of his 1/6th share, jointly with the defendants. The suit was contested by the first defendant respondent on a number of grounds, of which it is necessary to mention only the contention of fact, that the suit lands were not Mal lands, as alleged by the plaintiff and had never been assessed to revenue, nor were they included in the Mal assets of Touzi No. 6. It was also claimed by the defendants that the lands in dispute were *Brabmottar Lakheraj* lands which were never within the regularly assessed estate Touzi No. 6. Hence, the main issue, on question of fact, between the parties was : "Is the land in dispute Mal land of Touzi No. 6 or is it *Lakheraj*?" On this question, the learned Subordinate Judge, by his judgment and decree, dated 20th April, 1948, held in favour of the plaintiff and decreed the suit for possession, with mesne profits, to be ascertained later. The learned Subordinate Judge held that the land in suit was Mal land of the Touzi No. 6 and other Touzies, and that the defendants' interest was not protected from annulment under section 37 of the Act of 1859. The first defendant appealed to the High Court in July, 1948 ; and the appeal was pending when the Amending Act was enacted. When the appeal was put up for hearing before a Division Bench on 8th March, 1954, the learned Judges thought it necessary to call for a finding on the question whether possession had already been delivered to the successful plaintiff in execution of the decree of the Trial Court, before the Amending Act came into force. This enquiry was instituted in view of the sworn petition filed on behalf of the plaintiff at the hearing in the High Court that he had already obtained possession in execution of the decree on 29th March, 1949, and that, therefore, section 7 of the Amending Act did not render the appeal void. The defendant-appellant in the High Court contested this statement of fact. The learned Subordinate Judge submitted a finding to the High Court to the effect that possession of the disputed property had been delivered to the decree-holder, as alleged by him, on 29th March, 1949.

The High Court accepted the finding of the trial Court that possession had been delivered to the decree-holder in pursuance of the Trial Court's decree. The High Court further considered the effect of the proceedings taken at the execution stage. It appears that the plaintiff had made an application for delivery of possession on 28th March, 1949, and the following day, on 29th March, 1949, the judgment-debtor, who had already preferred his appeal to the High Court, filed a petition to the Court praying for one month's time to bring a stay order from the High Court and for stay of process meanwhile. The learned Subordinate Judge disposed of the petition, in the following terms :

"Judgment-debtor files a petition, praying for one month's time to bring a stay order and for stay of process in the meantime. Heard learned lawyer. Recall and put up in the presence of both parties. Inform Nazir."

The High Court very elaborately considered the effect of this order with reference to decided cases of different High Courts, and came to the conclusion that the delivery of possession which had been given to the decree holder was without authority and hence a nullity. The High Court then considered the effect of sections 4 and 7 of the Amending Act and came to the conclusion that the land in dispute being part of a permanent tenure, held rent free (Niskar), was protected under the provisions of the section aforesaid. The High Court took the view that the decree passed by the trial Court had become void under section 7 (2) of the Amending Act, and that section 7 (1) (b) had no application. It also took the view that section 7 (1) (a) would apply and on that account the plaintiff would be entitled to refund of the Court fees, as the suit had abated. But even so, the High Court was not prepared to accept the position that the defendant was entitled to the benefit of section 7 (1) (a) to the effect that the suit pending at the appellate stage had abated.

In the result, the High Court allowed the appeal, set aside the judgment and decree of the trial Court and directed that Court to record an order of abatement of the suit and to pass an order for refund of Court fees in favour of the plaintiff. The High Court directed the parties to bear their own costs, both in the trial Court and in the High Court.

On this appeal, it has been pointed out on behalf of the-appellant, that the suit when instituted was a good one in view of the provisions of section 37 of the Act XI of 1859, and that section 4 of the Amending Act, which amended section 37 of the main Act would not govern the present controversy for two reasons, namely, (1) that delivery of possession had already been given to the plaintiff in execution of the decree of the trial Court in his favour, and that, therefore, the controversy had been finally closed in his favour, and (2) because section 4 was not in terms retrospective. It is true that section 4 begins with the words "For section 37 of the said Act, the following section shall be substituted", and then follow the terms of the section, as is now. *Prima facie*, therefore, it is prospective in its operation. But when we look to the provisions of section 7, it becomes abundantly clear, as rightly pointed out by the High Court, that the section was retrospective in so far as it was made applicable to pending litigations. Section 7 is in these terms :

"7. (1) (a) Every suit or proceeding for the ejectment of any person from any land in pursuance of section 37 or section 52 of the said Act, and

(b) Every appeal or application for review or revision arising out of such suit or proceeding pending at the date of commencement of this Act shall, if the suit, proceeding, appeal or application could not have been validly instituted preferred or made had this Act been in operation at the date of the institution, the preferring or the making thereof abate.

(2) Every decree passed or order made, before the date of commencement of this Act, for the ejectment of any person from any land in pursuance of section 37 of section 52 of the said Act shall if the decree or order could not have been validly passed or made had this Act been in operation at the date of the passing or making thereof, be void : Provided that nothing in this section shall affect any decree or order in execution whereof the possession of the land in respect of which the decree or order was passed or made, has already been delivered before the date of commencement of this Act.

(3) Whenever any suit, proceeding, appeal or application abates under sub-section (1) or any decree or order becomes void under sub-section (2), all fees paid under the Court-fees Act, 1870, shall be refunded to the parties by whom the same were respectively paid."

It is common ground that the present suit is one for ejectment in pursuance of section 37 of Act XI of 1859. Hence, section 7 (1) (a) comes into operation. As will presently appear, section 7 (1) (a) would not apply to the appeal pending in the High Court. There cannot be the least doubt that the suit was pending in the High Court on appeal, at the commencement of the Amending Act, it being well settled that an appeal is a continuation of the original suit. That being so, the question is whether the suit could have been validly instituted, had the Amending Act been in operation at the date of the institution of the suit. That brings in the provisions of section 4. The relevant provisions of that section are as follows :

4. For section 37 of the said Act, the following section shall be substituted, namely :—

"37. (1) The purchaser of an entire estate in the permanently settled districts of West Bengal sold under this Act for the recovery of arrears due on account of the same, shall acquire the

free from all encumbrances which may have been imposed after the time of settlement and shall be entitled to avoid and annul all tenures, holdings and leases with the following exceptions :—

(a) tenures and holdings which have been held from the time of the permanent settlement either free of rent or at a fixed rent, or fixed rate of rent, and

(b) (i) tenures and holdings not included in exception (a) above made, and

(ii) other leases of land whether or not for purposes connected with agriculture or horticulture,

existing at the date of issue of the notification for sale of the estate under this Act :

* * * * *

(2) For the purposes of this section :

(a) (1) 'tenure' includes a tenure as defined in the Bengal Tenancy Act, 1885,

* * * * *

By virtue of section 37 (1), as amended, the plaintiff as the purchaser of the entire estate, Touzi No. 6, sold for recovery of arrears on account of that Touzi, had acquired the estate free from all encumbrances, and was entitled to avoid and annul all tenures, except those detailed in (a) and (b) of that section. Section 37 (1) (a) would not come into operation in this case because the finding is that the defendants had failed to prove the existence of the tenure since the time of the Permanent Settlement. But clause (b) (i) would apply if it was a tenure in existence at the date of the issue of the notification for the sale of the estate. The defendant's property was a tenure so in existence, on the finding by the High Court that the tenure had been in existence from before 1910.

On the facts so found, what is the legal position? The Amending Act of 1950 was intended to grant relief to tenure holders under proprietors whose estates had been sold under the Act of 1859, if those tenures had not been wiped out as a result of annulment under section 37 of the old Act, and those annulments had become accomplished facts before the Amending Act came into force on 15th March, 1950. Section 4 grants relief to tenure-holders even in respect of revenue sales held before that date, if the provisions of section 7 which give retrospective operation as aforesaid to the substantive provisions of the Amending Act, which had extensively cut down the rigorous of the old section 37 are attracted. Section 7 contemplates three kinds of cases, namely, (1) a pending suit or proceeding for the ejectment of any person in respect of his tenure or lease-hold, irrespective of whether or not the lease was for purposes connected with agriculture or horticulture ; (2) pending appeal or application for review or application for revision arising out of (1) above, this appeal or application being one by an unsuccessful plaintiff and not by an unsuccessful defendant, because the abatement contemplated by the section intended to close the door against an attack on pre-existing title and not against defence of such a title ; and (3) a final decree or order made for ejectment. A decree or order against which an appeal has been filed and has been pending on the date of the commencement of the Act, if it is by the unsuccessful plaintiff or applicant, would be covered by section 7 (1) (b) ; whereas a decree or order for ejectment which has become final because either no appeal was preferred against it, or if there had been one, it has been finally decided, would be within the purview of section 7 (2). If such a final decree for ejectment has been executed by delivery of possession of the land in question, before the commencement of the Amending Act, the Legislature did not intend to reopen such closed transactions. But except those, in all the categories (1) to (3) above, if the suit, appeal, or proceeding could not have been validly instituted, preferred or made, in terms of the Amending Act, all those pending suits or appeals or applications would abate according to section 7 (1) (a) and (b); and the decrees would become void according to section 7 (2).

Under which category would the suit in the instant case come? It is well settled that a pending appeal is a continuation of the suit out of which it arises. In other words, the suit is pending on appeal. Hence, the present suit, which was pending in the High Court on the date the Amending Act came into force, will come within the purview of section 7 (1) (a). It will not come under the second

category because it is not on appeal by an unsuccessful plaintiff, nor will it come under category (3) above, because the decree passed against the defendant had not become final in the sense already indicated. Hence, in partial disagreement with the High Court, we hold that the suit pending in the High Court on appeal had abated on 15th March, 1950, under section 7 (1) (a) as soon as the Amending Act came into force. In this view of the matter, it is not necessary to consider the effect of the delivery of possession, given as aforesaid, during the pendency of the appeal in the High Court.

In the result, the appeal fails and is dismissed, though not for the same reasons as prevailed in the High Court. In view of the fact that the suit has failed on account of the coming into force of the Amending Act during the pendency of the litigation, there will be no orders as to costs in this Court also.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Ajit Kumar Palit

.. *Appellant**

v.

The State of West Bengal and another

.. *Respondents.*

West Bengal Criminal Law Amendment (Special Courts) Act (XXI of 1949), sections 4 and 5—Cognizance of offences by Special Courts—Allotment of case by the State Government—Special Court may take cognizance in the manner laid down in section 190 (1) (a) and (b) of Criminal Procedure Code (V of 1898)—Effect of Amending Act (XXIV of 1960) on cases taken cognizance of.

Sections 190 to 194 of the Code of Criminal Procedure show that proceedings may be initiated and cognizance of an offence taken either directly or upon transfer of a case or by commitment, or on information filed by the Advocate-General. Direct cognizance can be taken only by certain classes of Magistrates specified in section 190 (1) of the Code.

The Special Court is not a Sessions Court or a High Court as to require an order of committal by a Magistrate as a pre-condition for the emergence of its jurisdiction to proceed judicially with the matter.

It is thus clear that there is no statutory requirement under the Criminal Procedure Code as to the class or character of material that must be before a Special Judge before he can assume and exercise jurisdiction over a case. It was common ground that the same is not a requirement of the Special Courts Act either.

The words "Court of Session" have a well-understood meaning and significance in the hierarchy of Courts under the Code of Criminal Procedure and the Special Court is constituted not such a Court but as it is being vested with the powers of a Sessions Court though with modifications, the word "deemed" is used. If the Special Court is "deemed" to be a Court of Session, a doubt might arise as to whether the provision in section 193 (1) of the Code is or is not inconsistent with the Act (*vide* section 5 (2) of the Act), and hence to clear the position section 5 (1) enacts, so to say, that notwithstanding that a Special Court is "deemed" to be Court of Session section 193 (1) of Code does not apply to it and an initial cognizance by a Magistrate followed by an order of commitment is not necessary for cognizance being taken by the Special Judge.

The observations in *Bhajahari Mondal v. State of West Bengal*, (1959) S.C.J. 191 : (1959) M.L.J. (Crl.) 59 : 1959 S.C.R. 1276 were not meant to suggest that the jurisdiction of the Special Judge to proceed with the trial of a case duly allotted to him did not spring wholly from the allotment which really was a substitute for a commitment under section 193 (1) of the Code, but depended in part at least on the existence of other material of a nature prescribed by statute disclosing the commission of an offence.

The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a Court or Judge, to take notice of judicially.

As soon as a Special Judge receives the orders of allotment of the case passed by the State Government it becomes vested with jurisdiction to try the case and when it receives the record from the Government it can apply its mind and issue notice to the accused and thus start the trial of the proceedings assigned to it by the State Government.

There are no express words in the Amendment Act (XXIV of 1960) which made it retrospective or retroactive to operate from the commencement of the Act. The amendment relating to, as it is, obviously a matter of procedure would have applied to pending proceedings, but there was nothing in the Amending Act invalidating proceedings commenced without reference to the amended provisions; in other words, the Special Judge having validly acquired jurisdiction to proceed with the trial of the case allotted to him, there was nothing in the Amending Act to deprive him of that jurisdiction.

The Amending Act does not purport to be declaratory but seeks in terms to carry out an amendment, in other words, to effect a change. The mere fact that the change effected conforms to a particular interpretation which the words which previously existed might bear and which found acceptance at the hands of the Courts in a few cases, is, a wholly insufficient foundation to base an argument that it is declaratory and further that it must be taken to have declared the law from the commencement of the parent Act so as to invalidate all proceedings validly taken on a proper construction of the law as it then stood.

Appeal by Special Leave from the Judgment and Order dated the 8th June, 1961 of the Calcutta High Court in Criminal Revision No. 1557 of 1959.

P.K. Chakravarti, Amiyalal Chatterjee and P. K. Mukherjee, Advocates, for Appellant.

B. Sen, Senior Advocate (*P. K. Chatterjee and P. K. Bose*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal raises for consideration the proper construction of sections 4 and 5 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (XXI of 1949) to which we shall refer as the Act. The Preamble to the Act recites that it was enacted to provide for the speedy trial of the offences specified in the Schedule. Section 2 empowers the State Government to constitute by notification in the Official Gazette one or more Special Courts. Section 4 enacts, to extract only the portion relevant to this appeal :

“Section 4 (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law, the offences specified in the Schedule shall be triable by Special Courts only.

.....
(2) The distribution amongst Special Courts of cases involving offences specified in the Schedule, to be tried by them, shall be made by the State Government.”

This is followed by section 5 reading, again confining ourselves to the portion material for this appeal :

“Section 5 (1) A Special Court may take cognizance of offences without the accused being committed to his Court for trial, and in trying accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrant cases by Magistrates, instituted otherwise than on a police report.

.....
(2) Save as provided in sub-section (1) or sub-section 1 (a), the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with the present Act, apply to the proceedings of a Special Court ; and for the purposes of the said provisions, a Special Court shall be deemed to be a Court of Sessions trying cases without a jury, and a person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.”

As recited in the Preamble and in section 4, there is a Schedule setting out the offences which are triable solely by these Special Courts.

The facts giving rise to the present appeal may now be stated. The police filed a report before the Chief Presidency Magistrate at Calcutta in February, 1958 charging ten accused persons including the appellant, of offences under section 120-B read with section 409 and section 477, Indian Penal Code. Subsequently, by an order of the State Government dated 1st June, 1959 notified in the Official Gazette the said case was assigned to the Calcutta Additional Special Court under section 4 (2) of the Act, and in the said communication the names and description of the accused as well as the offences with which they were charged were set out. Sometime later amendments were made to this Notification but nothing turns on them. On 26th September, 1959, the Investigating Officer of the Enforcement Branch, Calcutta, filed a petition before the Special Judge praying that the Judge might be pleased to take cognizance of the case which had been allotted to him and

issue process against the several accused and pass such orders as he might deem just. On the same day (26th September, 1959), the Additional Special Judge took cognizance of the offences and issued notices to the accused persons fixing a date for their appearance.

On receipt of this notice the appellant made an application before the Special Judge stating that the initiation of the proceedings against him based on the petition of the Investigating Officer, Enforcement Branch, Calcutta, was not proper and legal and that in consequence the Special Judge was incompetent to proceed in that matter. The Additional Special Judge rejected that petition. The appellant then moved the High Court of Calcutta in revision, urging the same ground, namely, that the Special Judge could not take cognizance of the offence on the "complaint" of the police officer and had therefore no jurisdiction to proceed with the trial of the case. At this stage, it is necessary to mention that in two earlier decisions of the Calcutta High Court the view had been held that a Special Judge did not acquire jurisdiction to proceed with the trial of a case merely on an allotment of a case to him under section 4 (2) of the Act duly notified in the Gazette, but that to enable him to take "cognizance" of a case the provisions of section 190 (1) of the Criminal Procedure Code had to be complied with and that having regard to the concluding words of section 5 (1) of the Act extracted earlier, this had to be "otherwise than on a police report."

In the previous decisions the learned Judges drew a distinction between "cognizance" of a case and jurisdiction to proceed with the trial and held that unless the Special Judge had material before him in the proper statutory form, he could not take "cognizance" notwithstanding the allotment of the case to him by the State Government with the result that he was incompetent to proceed with trial of such a case.

The Division Bench before which the revision of the present appellant came on for disposal entertained doubts about the correctness of these two earlier decisions and accordingly the matter was referred for the consideration of a Full Bench. The questions referred were :

(1) Does the Special Judge appointed under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, to whom a case has been allotted by notification under section 4 (2) of the Act need a petition of complaint for taking cognizance of the case or does he take cognizance when on receiving the Government notification and the record of the case from the Court of the Magistrate, he applies his mind to the facts of the case?

(2) There was a second question which specially referred to the two earlier decisions and raised a query as to whether they had been correctly decided.

The learned Judges of the Full Bench by a majority answered the questions in the following terms :

"A Special Court is said to have taken cognizance when on receiving the Government Notification of the allotment or distribution of the case and the records of the case, it applies its mind to the facts of the case and takes some steps for proceedings under the subsequent sections of Chapter XXI of the Code."

The second question was answered by saying that the earlier decisions referred to were incorrect.

After the order of reference to the Full Bench and before the hearing of the reference, the West Bengal Legislature enacted Act XXIV of 1960—The West Bengal Criminal Law Amendment (Special Courts) (Amending) Act, 1960. Section 2 of this enactment effected changes in section 5 of the Act as extracted earlier, so that after the amendment it read :

"Section 5 (1) A Special Court may take cognizance of offences in the manner laid down in clauses (a) and (b) of sub-section (1) of section 190 of the Criminal Procedure Code, 1898, without the accused being committed to his Court for trial, and in trying accused persons,....."

the portion italicised being that newly added.

On of the points canvassed before the Full Bench related to the applicability of this provision to the present proceedings. The learned Judges observed that though the amendment being in relation to a matter of procedure might ordinarily apply to pending proceedings as well, it did not however have the effect of invalidating proceedings already taken, in the absence of a specific provision to that effect and in consequence they held that the validity of the proceedings before the Special Judge and his jurisdiction to proceed with the trial on the accused was governed solely by the Act as it stood before the amendment.

Following the opinion expressed by the Full Bench the revision petition filed by the appellant was dismissed. The appellant who comes here by Special Leave contests the correctness of the answer of the Full Bench on these points.

We shall first take up for consideration the main question that arises in the case as regards the jurisdiction of the Special Judge to take cognizance of an offence without the procedure prescribed by section 190 (1) being complied with.

In order to appreciate the scope of section 190 (1) of the Criminal Procedure Code it is necessary to mention that it is the first of a *fasciculus* of sections comprised in Part B of Chapter XV containing sections 190 to 199 dealing with the statutory conditions necessary for the initiation of criminal proceedings. Of these, sections 190 to 194 form one group and it is sufficient to confine attention to them :

" 190 (1) Except as hereinafter provided, any Presidency Magistrate or District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

- (a) upon receiving a complaint of facts which constitute such offence ;
- (b) upon a report in writing of such facts made by any police officer ;
- (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.
- (2)
- (3) "

" 191. When a Magistrate takes cognizance of an offence under sub-section (1), clause (c) of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Sessions or transferred to another Magistrate."

" 192 (1) Any Chief Presidency Magistrate, District Magistrate, or Sub-divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial ; and such Magistrate may dispose of the case accordingly."

" 193 (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

" 194 (1) The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided.

" Nothing herein contained shall be deemed to affect the provisions of any letters patent or law by which a High Court is constituted or continued, or any other provision of this Code."

(2) (a) Notwithstanding anything in this Code contained, the Advocate-General may, with the previous sanction of the State Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

- (b)
- (c)
- (d) "

A perusal of these would show that proceedings may be initiated and cognizance of an offence taken either directly or upon transfer of a case or by commitment,

or on information filed by the Advocate-General. Direct cognizance can be taken only by certain classes of Magistrates specified in section 190 (1). It should be noticed that the application of this section is limited to Presidency Magistrates, District Magistrates, Sub-divisional Magistrates and other Magistrates specially empowered in that behalf and it is common ground that the judge of the Special Court appointed under section 2 of the Act is not within the class of Magistrates designated by section 190 (1) and hence there can be no question of such a judge having to comply with its requirements before he can "take cognizance of an offence". Nor is it the contention of the appellant that such Court is a Sessions Court or a High Court as to require an order of committal by a Magistrate as a pre-condition for the emergence of its jurisdiction to proceed judicially with the matter.

It is thus clear that there is no statutory requirement under the Criminal Procedure Code as to the class or character of material that must be before a Special Judge before he can assume and exercise jurisdiction over a case. It was common ground that the same is not a requirement of the Special Courts Act either.

There were however certain matters which were relied on as pointing to a different inference to which we shall immediately refer. In the first place it was urged that section 5 (1) of the Act merely precluded an objection being taken to the jurisdiction of the Special Court by reason of there being no commitment, but did not positively provide whether or not other material was necessary before cognizance could be taken of the offence besides, of course, the order of allotment under section 4 (2). In other words, the argument was that the order of allotment was not either expressly or by necessary implication to be equated to a committal order under section 193 (1). This contention was sought to be reinforced by reference to the language employed in section 5 (2) of the Act whereunder the Special Court was not constituted "a Court of Session" but was only *deemed* to be one such indicating as it were, that it was not that in truth. We consider that this submission totally lacks substance. We are unable to draw the inference which learned Counsel for the appellant does from the word "deemed" in section 5 (2) of the Act. The fact is that the words "Court of Session" have a well-understood meaning and significance in the hierarchy of Courts under the Code of Criminal Procedure and the Special Court is constituted not such a Court but as it is being vested with the powers of a Sessions Court though with modifications, the words "deemed" is used. If the Special Court is "deemed" to be a Court of Session, a doubt might arise as to whether the provision in section 193 (1) of the Code is or is not inconsistent with the Act (*Vide* section 5 (2) of the Act), and hence to clear the position section 5 (1) enacts, so to say, that notwithstanding that a Special Court is "deemed" to be Court of Session, section 193 (1) does not apply to it and that an initial cognizance by a Magistrate followed by an order of commitment is not necessary for cognizance being taken by the Special Judge.

If section 190 (1) and section 193 (1) of the Code do not apply, the next question that calls for consideration is what more besides the order of the State Government under section 4 (2) of the Act is needed to vest that Court with jurisdiction to proceed. It was suggested that section 5 (1) of the Act might at the best obviate the necessity for an order of commitment but that it did not on that account negative the need for some proper material on the basis of which alone "cognizance" may be taken and it was further submitted that in the case of a Judge of a Special Court cognizance of a case was different from jurisdiction to conduct the trial, the former being dependent on the existence of material which alone invested the Court or Judge with jurisdiction, so to speak, to initiate the proceedings. Throughout the arguments of the learned counsel for the appellant there was an underlying assumption that jurisdiction to proceed with the trial of the case was different from "cognizance" which was some technical requisite necessary to invest the Judge or Magistrate with jurisdiction and that in the absence of proper material for cognizance being taken he was incompetent to proceed with the trial of the case allotted to him.

Much of the arguments on this head was based on a passage in the judgment of this Court in *Bhajahari Mondal v. The State of West Bengal*¹, which dealt with the Act. That passage runs :

"The crucial date for the purpose of determining the jurisdiction of the Court would be the date when the Court received the record and took cognizance of the case and took any step in aid of the progress of the case and not when the evidence of the witnesses began to be recorded. Under section 4 of West Bengal Act (W.B. Act XXI of 1949) as amended by the Act of 1952 the jurisdiction of the Court arises when the notification is issued distributing the case to a particular Special Court giving the name of the accused and mentioning the charge or charges against him which must be under one of the offences specified in the Schedule. In the absence of any of these elements the Special Court would have no jurisdiction."

It was stressed that reference was here made to two matters as necessary to confer jurisdiction on the Special Court : (1) The issue of the notification under section 4 (2) of the Act, (2) Receipt of the Record and "the taking cognizance of the case" and the taking of a step in aid of the progress of the case and it was urged that the latter requirement brought in really the substance of section 190 (1) of the Criminal Procedure Code. We are satisfied that these observations were not meant to suggest that the jurisdiction of the Special Judge to proceed with the trial of a case duly allotted to him did not spring wholly from the allotment which really was a substitute for a commitment under section 193 (1) of the Code, but depended in part at least on the existence of other material of a nature prescribed by statute disclosing the commission of an offence. Our reading is further strengthened by the fact that in a later portion of the same Judgment when dealing with the applicability to the Special Judge of the curative provision in section 529 of the Code reading :—

"If any Magistrate not empowered by law to do any of the following things, namely :—

.....
(e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b) ;

.....
erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

it was specifically pointed out that the provision which is applicable to Magistrates designated in section 190 (1) is not applicable to the Special Judge who does not take cognizance in that manner.

The provisions of section 190 (1) being obviously, and on its own terms, inapplicable, the next question to be considered is whether it is the requirement of any principle of general jurisprudence that there should be some additional material to entitle the Court to take cognizance of the offence. The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means, become aware of and when used with reference to a Court or Judge, to take notice judicially. It was stated in *Gopal Marwari v. Emperor*², by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in *R. R. Chari v. State of Uttar Pradesh*³, that the word "cognizance" was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in *Emperor v. Sourindra Mohan Chuckerbutty*⁴, "taking cognizance does not involve any formal action ; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence". Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled. Thus, a Sessions Judge cannot exercise that original jurisdiction which Magistrates specified in section 190 (1) can, but the material on which alone he can apply his judicial mind and proceed under the

1. (1959) S.C.J. 191 : (1959) M.L.J. (CrL) 59 : (1959) S.C.R. 1276.

2. A.I.R. 1943 Patna 245.

3. (1951) S.C.J. 302 : (1951) 1 M.L.J. 617 : (1951) S.C.R. 312 at p. 320.

4. I.L.R. 37 Cal. 412 at p. 416.

Code is an order of commitment. But statutory provision apart, there is no set material which must exist before the judicial mind can operate. It appears to us therefore that as soon as a Special Judge receives the orders of allotment of the case passed by the State Government it becomes vested with jurisdiction to try the case and when it receives the record from the Government it can apply its mind and issue notice to the accused and thus start the trial of the proceedings assigned to it by the State Government.

Some little point was made of the words "otherwise than on a police report" occurring at the end of section 5 (1) of the Act. In our opinion, nothing turns on them. These words were not there in the Act as originally enacted in 1949, but were introduced by an amendment effected by W. B. Act XXVI of 1956. In 1949 the date of the original enactment there were not two procedures prescribed for being followed by Magistrates taking cognizance under the different clauses of section 190 (1) of the Code. But the Criminal Procedure Code was amended by Act XXVI of 1955 when section 251-A was introduced and under this new provision a special procedure was introduced for the trial of cases of which cognizance was taken on a police report (section 190 (1) (b)). The amendment of the Act by the inclusion of those words was merely to ensure the inapplicability of section 251-A to the procedure to be followed in special Courts and has obviously no further significance.

The next point for consideration is the effect of the amendment of 1960 on the jurisdiction of the Special Court to deal with the case of the appellant. Learned counsel for the appellant addressed an elaborate argument on it but in substance the contention was that the amending Act was in essence declaratory since it had accepted the correctness of one of two interpretations which had been placed upon section 5 (1) of the Act as it originally stood. He therefore invited us to hold that the Legislature had thereby intended that that interpretation should govern the provision from the date when the Act was originally enacted. Before considering this point it is necessary to put aside certain matters : (1) It was not contended that there were any express words in the amending Act which made it retrospective or retroactive to operate from the commencement of the Act, (2) The amendment relating to, as it is, obviously a matter of procedure would have applied to pending proceedings, but it was not suggested there was anything in the amending Act invalidating proceedings commenced without reference to the amended provisions ; in other words, the Special Judge having validly acquired jurisdiction to proceed with the trial of the case allotted to him, there was nothing in the amending Act to deprive him of that jurisdiction.

It is in the background of these considerations which the learned counsel did not dispute, that his submissions have to be considered. Learned counsel referred us to a very considerable number of decisions on the interpretation of statutes, but we have not found them of assistance or even relevance. The amending Act does not purport to be declaratory but seeks in terms to carry out an amendment, in other words, to effect a change. The mere fact that the change effected conforms to a particular interpretation which the words which previously existed might bear and which found acceptance at the hands of the Courts in a few cases, is, in our opinion, a wholly insufficient foundation to base an argument that it is declaratory and further that it must be taken to have declared the law from the commencement of the parent Act so as to invalidate all proceedings validly taken on a proper construction of the law as it then stood.

We find therefore that there is no substance in the argument regarding the effect of the amending Act upon which reliance is placed for the purpose of impugning the jurisdiction of the Special Court and we have no hesitation in repelling that argument.

The result is that the appeal fails and is dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Ram Lochan Ahir

.. Appellant*

v.

The State of West Bengal

.. Respondent.

Evidence Act (I of 1872), section 9—Scope and effect—Super-imposed photograph as a means of identifying the skeleton as that of the murdered person—Whether admissible in evidence.

Even if the super-imposed photograph (for identifying the skeleton) was not admissible in evidence, the verdict of the Jury and the conviction of the appellant could not be set aside because there was very cogent other evidence to prove the identity of the skeleton.

The question at issue in the instant case is the identity of the skeleton. That identity could be established by its physical or visual examination with reference to any peculiar features in it which would mark it out as belonging to the person whose bones or skeleton it is stated to be. Similarly the size of the bones, their angularity or curvature, the prominances or the recessions would be features which on examination and comparison might serve to establish the "identity of any thing" within the meaning of section 9 of the Evidence Act (I of 1872). Thus the super-imposed photograph is admissible evidence under section 9 of the Evidence Act.

Appeal from the Judgment and Order dated the 28th/29th March, 1961 of the Calcutta High Court in Criminal Appeal No. 769 of 1960.

D. N. Mukherjee, Advocate, for Appellant.

P. K. Chakravarti and *P. K. Bose*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is an appeal on a certificate under Article 134 (1) (c) against the conviction of the appellant under section 302, Indian Penal Code, and the sentence for imprisonment for life passed against him for the said offence.

One Pancham Sukla was an employee under the Calcutta Port Commissioner where also the appellant was employed. Pancham attended office last on the 10th of March, 1960 and at about 5-30 that evening he was seen in the company of the appellant. That was the last time he was seen alive and since then he has not been found. Pancham not having returned to his house his brother-in-law and another lodged a report with the police stating that Pancham had been missing for the previous two days and in the said report gave a description of the missing person as well as the clothes that he wore at the time he left his residence. The fact that Pancham was last seen with the appellant was stated in a further report which the brother-in-law lodged with the police on the next day 13th March, 1960. The appellant was arrested on 21st March, 1960, and on interrogation by the police he stated that Pancham Sukla was dead and admitted that he had buried the body of the deceased in the mud in a tank of which he gave a description. The place pointed out was searched and therefrom a human skeleton partly covered with a torn dhoti, underwear and a torn kurta in the side pocket of which was found a flag, were discovered. The appellant was also stated to have pointed out to the police in the course of further investigation that he had thrown a knife into the same tank. A search was made when not merely a knife but a shoe with a rubber sole, a human lower jaw bone etc. were recovered. After some more investigation a complaint was laid before the Magistrate, who after enquiry committed the appellant to take his trial before the Sessions Court where he was tried with the aid of a jury.

The appellant was charged with the commission of two offences : (1) under section 364, Indian Penal Code, of having abducted Pancham Sukla in order that he might be murdered, and (2) the substantive offence of having committed the murder under section 302, Indian Penal Code. It may be mentioned that at the trial the articles recovered—the dhoti, shirt, underwear, shoe and the flag were all identified as having belonged to and being worn by the deceased when he was last seen. The

jury accepted the evidence of the prosecution and returned a verdict of guilty against the appellant on both the counts. The learned Sessions Judge accepted the verdict and sentenced him to death under section 302, Indian Penal Code, and to rigorous imprisonment for life in respect of the offence under section 364, Indian Penal Code.

The appellant filed an appeal to the High Court of Calcutta and the learned Judge acquitted the appellant of the offence of kidnapping under section 364, Indian Penal Code, but confirmed the finding of guilt as regards the offence of murder under section 302, Indian Penal Code, but reduced the sentence to imprisonment for life.

Having regard to the points which have been urged before us we do not think it necessary to canvass the grounds upon which the learned Judges set aside the verdict of guilty returned by the jury and the conviction of the appellant by the Sessions Judge in respect of the offence under section 364, Indian Penal Code, but are concerned only with two points which have been made by learned counsel in support of the appeal. The first point urged relates to the identification of the skeleton which was found in the tank as that of the deceased Pancham Sukla ; in other words, whether there was proof that Pancham Sukla was killed or had even died. The identification of the skeleton rested on three distinct lines of evidence : (1) The statement of the appellant to the police under section 27 of the Indian Evidence Act which led to the discovery of the skeleton ; (2) The identification of the clothes, shoes, etc., which were found on or near the skeleton as those which were worn by Pancham Sukla at the time he last left his house. The place where these articles were discovered in relation to that where the skeleton was found unmistakably pointed to the articles having formed part of the dress of the person whose skeleton was there found, and (3) a photograph of Pancham Sukla super-imposed on the photograph of the skeleton.

There was some argument before the Sessions Judge and the High Court as regards the admissibility in evidence of the super-imposed photograph as a means of identifying the skeleton as that of the deceased and it is this legal objection raised by the appellant that forms the ground of the certificate granted by the learned Judges of the High Court. Learned counsel urged before us that the super-imposed photograph was not admissible in evidence and that its reception vitiated the verdict of the jury. We are clearly of the opinion that even if this photograph was not admissible in evidence the verdict of the jury and the conviction of the appellant could not be set aside because there was very cogent other evidence to prove the identity of the skeleton. Since, however the learned Judges of the High Court have thought fit to grant a certificate, though they were themselves conscious of the fact that besides the photographs there was plenty of other evidence to sustain the conviction, we consider it proper to express our opinion on the question.

The process adopted for taking the super-imposed photograph as explained by P. W. 18 the Assistant Chemical Examiner of the West Bengal Government was this : He first got a photograph of Pancham Sukla. This was photographed, the negative being taken on a quarter plate and the negative was enlarged. He got the skull and as the skull was broken in some parts the bones were pieced together and an enlarged photograph of the skull as reconstructed was taken. A negative of this was enlarged to the same size as the negative of the photo of the deceased with the angle and positions of the two being identical. The two negatives were then super-imposed. For the super-imposition the technique employed by him was thus explained :

"The ground glass of the camera was taken out, the negative of the photograph alleged of Pancham Sukla was placed on it, prominent markings of the negative were carefully jotted down on the ground glass, the markings being the following, *viz.*, nasion-nasomental line, malar bones with prominences and two outer canthuses and two inner canthuses of the two eye balls and the inner ends of the supra orbital ridges, thereafter the ground glass was fitted in the camera, the skull was so orientated that all the points of the skull came in exact position with the markings made on the ground glass as mentioned when the photograph of the skull was taken ; then the two negatives were placed by aligning in such a way that all the points as mentioned above corresponded on a sensitive bromide paper under an enlarger. The resultant is the photograph submitted to the Court."

The photographer who executed this work under the supervision of P. W. 18 was Tapendra Nath Mazumdar, who was examined as P. W. 19. This super-imposed photograph showed the shape and contour of the bones of the face underneath the face as it looked when the deceased was alive, and the prosecution sought by means of this document to establish the identity of the skull as that of the deceased, or in any event to dispel any positive argument for the defence that the skull was not that of the deceased.

The contention urged before us by learned counsel was that this photograph was not admissible under any section of the Indian Evidence Act. If learned counsel is right here, he could succeed in having this evidence rejected as inadmissible. We are, however, clearly of the opinion that it is admissible in evidence under section 9 of the Evidence Act. The section reads :

"9. Facts necessary to explain or introduce a fact in issue or relevant fact or which support or rebut an inference suggested by a fact in issue or relevant fact, *or which establish the identity of any thing or person whose identity is relevant*, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

The question at issue in the case is the identity of the skeleton. That identity could be established by its physical or visual examination with reference to any peculiar features in it which would mark it out as belonging to the person whose bones or skeleton it is stated to be. Similarly the size of the bones, their angularity or curvature, the prominences or the recessions would be features which on examination and comparison might serve to establish the "identity of a thing" within the meaning of section 9. What we have in the present case is first a photograph of that skull. That the skull would be admissible in evidence for establishing the identity of the deceased was not disputed, and similarly a photograph of that skull. That a photograph of the deceased was admissible in evidence to prove his facial features, where these are facts in issue or relevant facts, is also beyond controversy. Now what P.W. 18 with the assistance of P. W. 19 has done is to combine these two. The outlines of the skull which is seen in the super-imposed photograph show the nasion prominences, the width of the jaw bones and their shape, the general contours of the cheek bones, the position of the eye cavity and the comparison of these with the contours etc., of the face of the deceased as seen in the photograph serve to prove that features found in the skull and the features in the bones of the face of the deceased are identical or at least not dissimilar. It appears to us that such evidence would clearly be within section 9 of the Evidence Act.

The learned counsel for the appellant urged that the super-imposed photograph was not a photograph of any thing in existence and was for that reason not admissible in evidence. This argument proceeds on a fallacy. In the first place, a super-imposed photograph is not any trick photograph seeking to make something appear different from what it is in reality. There is no distortion of truth involved in it or attempted by it. A super-imposed photograph is really two photographs merged into one or rather one photograph seen beneath the other. Both the photographs are of existing things and they are super-imposed or brought into the same plane enlarged to the same size for the purpose of comparison. Possibly some illustrations might make this point clear. For instance, if the photo of the deceased when alive were printed on a transparent medium and that were placed above a photograph of the skull—both being of the same size—the visual picture seen of the two together would approximate to the document objected as inadmissible. In the above, it would be seen both the photographs would be admissible in evidence and no objection could be taken to their being examined together. Again for instance, if instead of a two dimensional photograph we had first a hollow model of the head of the deceased say of transparent or semi-transparent material—constructed or made from a photograph, that certainly would be admissible in evidence provided there was proof that the model was exactly and accurately made. If the model were dismantled into segments and placed upon the skull with a view to show that the curves and angles, the prominences or depressions etc., exactly corresponded there could be no dispute that it would be a perfect method of establishing identity. If this were granted the

super-imposed photograph which is merely a substitute for the experiment with the model which we have just now described would be equally admissible as evidence to establish the identity of a thing. It was pointed out that this was the first occasion that in India an identity of a skeleton was sought to be established by means of super-imposed photographs and that P. W. 18 had done this experiment by reference to what he had read in the books on the subject and that on that ground the evidence could not be accepted. Any deficiency in scientific accuracy might go to the weight of the evidence which in the case on hand was a matter for the jury to consider, but we are now only on a very narrow question as to whether it is excluded from evidence as inadmissible. Our answer is that it was admissible in evidence.

The next point urged was that there had been a misdirection to the jury in setting out the statement of the accused to the police which led to the discovery of the skeleton. We have carefully gone through the charge to the jury and are satisfied that there is no substance in this objection. The learned Sessions Judge has quoted extracts from the decision of the Privy Council in *Kotayya v. Emperor*¹ and of this Court in *State of U. P. v. Deoman*² in which the scope of section 27 of the Indian Evidence Act has been discussed and has drawn to the attention of the jury only that portion of the statement of the accused which led to the discovery of the skeleton and the knife etc.

Lastly it was urged that the grounds upon which the learned Judges had set aside the conviction of the appellant of the offence under section 364, Indian Penal Code, would necessarily lead to the conclusion that he could not be held guilty of an offence under section 302, Indian Penal Code. The argument was on these lines. The learned Judges considered that the appellant had not, having regard to certain facts which they considered had been made out, the intention of killing Pan-cham when he took him out and that the killing must have taken place as a result of some quarrel which arose between them. From this learned counsel sought to urge : (1) that there was a quarrel, (2) that having regard to the quarrel the appellant must have had the right of private defence, and that (3) consequently killing was either fully protected or at the most it was a case of an offence under section 304, Part I, Indian Penal Code. We consider that there is no foundation for this argument. The trial was by jury whose verdict was that the appellant was guilty of murder. As we stated earlier, we are not now concerned with the correctness of the acquittal by the High Court of the appellant of the offence under section 364, Indian Penal Code or of the reasons on which that order was based. We must, however, point out that there is no suggestion before us that save and except what we have discussed earlier there had been any misdirection by the Sessions Judge in his charge to the jury. There is therefore no scope for the argument that that verdict should be interfered with or the conviction based on it altered on hypothetical considerations not founded on any facts on record.

The appeal fails and is dismissed.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, J. L. KAPUR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.
Pearey Lal

*Appellant**

v.

Rameshwar Das

Respondent.

Will—Construction—Conflicting dispositions—Bequest to wife—Nature of estate conferred—Test.

Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would

1. L.R. 74 I.A. 65 : I.L.R. 1948 Mad. 1 : (1947) 1 M.L.J. 219 : A.I.R. 1947 P.C. 67.
2. A.I.R. 1960 S.C. 1125.

* C.A. No. 338 of 1960.

have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. Adopting the construction suggested by the respondent, in the event of the adopted son predeceasing the testator, there would be no intestacy after the death of the testator's wife, as the defeasance clause would not come into operation. That was the intention of the testator is also clear from the fact that he mentioned in the will that no other relation except his wife and son should take his property and also from the fact that though he lived for about a quarter of a century after the execution of the will, he never thought of changing the will though his son had predeceased his wife. Thus, under the will, the gift over in favour of the son is only by way of defeasance.

Appeal by Special Leave from the Judgment and Order dated the 31st August, 1951 of the Punjab High Court in Letters Patent Appeal No. 64 of 1949.

S. P. Varma, for Appellant.
Bishan Narain, Senior Advocate (A. D. Mathur, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal raises the question of the construction of a will executed by one Girdhari Lal in the year 1897.

Girdhari Lal, a resident of Delhi, executed a will dated February 8, 1897, bequeathing his property, both movable and immovable, to his wife, Mst. Kishen Dei, and adopted son. The adopted son predeceased Girdhari Lal. After the death of Girdhari Lal in 1923, Mst. Kishen Dei executed a will dated October 8, 1941, bequeathing the property in dispute i.e. house No. 2045, situate in Delhi, to her brother's grandson, Rameshwar Das. One Pearey Lal, who is the defendant in this case, has been in occupation of a portion of the said house. After the death of Mst. Kishen Dei, Pearey Lal refused to execute a lease deed in favour of Rameshwar Das or pay him the rent in respect of the portion of the house occupied by him. Rameshwar Das had therefore to file a suit in the Court of the Subordinate Judge, Delhi, for evicting the defendant from the portion of the house occupied by him. The defendant, *inter alia*, pleaded that the plaintiff had no title to the said property, as Mst. Kishen Dei did not get an absolute interest therein under the will of her husband; he further pleaded that Girdhari Lal during his lifetime dedicated the said house under a will executed by him to Shiv Temple in Gali Patashe Minor and appointed him to be trustee of the said house. The learned Subordinate Judge found that under the will executed by Girdhari Lal, Mst. Kishen Dei got an absolute interest in the house. He further found that the will set up by the defendant whereunder he claimed that the house was dedicated to the said Minor had not been proved and that on the date when it was alleged to have been executed, Girdhari Lal was not of sound mind. In the result, he made a decree in favour of the plaintiff. On appeal the learned District Judge held that under the will of 1897 executed by Girdhari Lal, Kishen Dei got only a limited estate and, therefore, she could not under a will confer any interest on the plaintiff. In that view, he did not give his finding on the question whether the will set up by the defendant was true and valid. The decree of the learned Subordinate Judge was set aside and the suit was dismissed. The plaintiff preferred a Second Appeal to the High Court of East Punjab at Simla. Khosla, J., held, on construction of the will of 1897, that under the said will the testator gave a life interest to Mst. Kishen Dei and made a gift over to the adopted son; but as the gift over failed, the life estate became an absolute estate under section 112 of the Indian Succession Act. Alternatively he also found that on the wording of the will Mst. Kishen Dei got an absolute interest in the property. In the result he set aside the decree of the District Judge and restored that of the Subordinate Judge. It may be noticed at this stage that no argument was made before Khosla, J., that the defendant acquired a title to the portion of the house under a subsequent will executed by Girdhari Lal; presumably in view of the finding given by the learned Subordinate Judge that the executant was not of sound mind at the time the will was alleged to have been executed, no attempt was made to sustain its execution or validity. The defendant preferred a Letters Patent Appeal against the said judgment to a division Bench of the same High Court.

The said appeal was disposed of by Weston, C. J., and Falshaw, J. Weston, C. J., who delivered the Judgment on behalf of the Bench, held on a construction of the will of 1897 that the intention of the testator should be taken to be that at any rate on failure of the bequest to Nathi Mal, the testator's widow Mst. Kishen Dei should take an absolute interest in his property. The division Bench confirmed the judgment of Khosla, J. It may again be noticed that even before the division Bench the defendant did not rely upon the will alleged to have been executed by Girdhari Lal in his favour. The present appeal has been filed by Special Leave against the said judgment.

Mr. Verma, learned counsel for the appellant, raised before us the following two points :

(1) On a true construction of the will of 1897, executed by Girdhari Lal, Mst. Kishen Dei only got a life estate thereunder and, therefore, the plaintiff did not get any title to the property under the will executed by her in his favour. (2) The High Court went wrong in not considering and giving a finding on the question of the truth and validity of the will alleged to have been executed by Girdhari Lal in defendant's favour.

As the first question turns upon the construction of the will executed by Girdhari Lal in 1897, it will be convenient to read the relevant part thereof. Ex-P. 1 is the will executed by him on February, 8, 1897. After the usual preamble that appears in wills, the testator proceeds to state :—

“Further, I have reached the age of nearly 50 years and with my consent Nathi Mal, a boy of 7 years, has been adopted and an agreement has been got written from his father Bega Mal. Now my wife, Mst. Kishen Dei, daughter of Bega Mal, is living and I have got one storeyed house situated in the City of Delhi, Bazar Khari Baoli, inside Gali Batashan and some goods and my belongings are in my possession without partnership with anybody else. As long as I the testator am alive, I shall remain malik of entire movable and immovable property and am entitled to do whatever I wish to do. When I die then Mst. Kishen Dei, my wife, and after the death of the said Mussamat, my adopted son Nathi Mal, will become malik of all my movable and immovable property without partnership with anybody. The said Mst. Kishen Dei should live in this house and said Nathi Mal will get all the proprietary rights just like the testator. And no relation of mine has and will have any kind of claim to my movable and immovable property left by me.”

It must be conceded that there is some conflict of ideas in the document ; but in construing a will executed in 1897 the Court should try its best to get at the intention of the testator by reading the will as a whole. We must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. Another rule which may also be useful in the context of the present will is that the words occurring more than once in a will shall be presumed to be used always in the same sense unless a contrary intention appears from the will ; *see* section 86 of the Indian Succession Act. So, too, all parts of a will should be construed in relation to each other ; *vide* section 84 of the said Act. It is also a well recognized rule of construction that the Court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like : *see* section 75 of the said Act.

The circumstances under which the will was executed by the testator may be gathered from the will itself. The testator had a wife and an adopted son. He had no other near relations to be provided for. The only objects of his attachment and love were his wife and the minor adopted boy. He was anxious to provide for both of them. The object could be achieved in three ways, namely, (i) by conferring a life estate in his property on his wife and giving a vested remainder in the same to his adopted son ; (ii) by making a joint bequest to both of them ; and (iii) by making a bequest of an absolute interest to his wife with a gift over to his son operating by way of defeasance. Learned counsel for the appellant relies upon the following passage in the will. “The said Mst. Kishen Dei should live in this house and said Nathi Mal will get all the proprietary rights just like the testator” in support of the contention that in this sentence the testator made a clear

distinction between the nature of the estate given to the wife and that given to his son. He contends that the direction that Mst. Kishen Dei should only live in the house indicates that her interest was only a life interest in the house whereas the direction that Nathi Mal should be in the place of the testator indicate that he had absolute rights which the father had. If this sentence is disannexed from the rest of the document, it may lend some colour to the said argument, but in the context of the other recitals in the document, it fits in the scheme of bequest clearly expressed by the testator. The testator described his interest in the property thus :

"I shall remain *malik* of entire movable and immovable property and am entitled to do whatever I wish to do. When I die then Mst. Kishen Dei, my wife and after the death of the said Mussamat, my adopted son Nathi Mal, will become *malik* of all my movable and immovable property without partnership with anybody."

It is not disputed, and it cannot be disputed, that the said description of his rights is that of an absolute interest. The expression "*malik*" has a well known connotation and it has found judicial recognition in various decisions of High Courts and the Privy Council. It may not be a term of art but is a word of definite content that has become part of the vocabulary of the common men and particularly of document writers. When the testator used the said word he must have intended to convey the accepted meaning of said word. In *Sasiman Choudhurai v. Shiv Narain*¹ the Privy Council said that the term "*malik*" when used in a will or other document is descriptive of the position which a devisee or donee is intended to hold and has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. This Court, in *Ram Gopal v. Nand Lal*², accepted the said observations of the Privy Council as a correct statement of law, but added that it should be taken with the caution which the Judicial Committee uttered in the course of the same observation, namely, that "the meaning of every word in an Indian document must always depend upon the setting in which it is placed, the subject to which it is related and the locality of the grantor from which it receives its true shade of meaning". It is not necessary to multiply decisions, as the expression "*malik*" has been consistently understood by Courts as conveying the idea of absolute ownership. It must, therefore, be held that the testator used the word "*malik*" to describe his absolute interest in the property. Apart from the meaning generally given to this word, the testator, himself furnished a dictionary for interpreting the said term in the will. With the knowledge of the meaning of the word "*malik*" the testator proceeded to describe the interest conferred on his wife in the same terms, namely, that she should become "*malik*" without partnership with anybody. If the will stopped there there could not have been any controversy as regards the nature of the bequest. But the testator proceeded to state that after the death of his wife, his adopted son would become "*malik*" without partnership with anybody. The words must bear the same meaning *i.e.*, the testator intended that after the death of his wife, his adopted son should become the absolute owner of the property. These two bequests *prima facie* appear to be inconsistent with each other, for there are two absolute bequests of the same property in favour of his wife and, after her death, in favour of his son. Two constructions are possible : one is to accept the first and negative the second on the ground that it is repugnant to the first ; the other is to make an attempt to reconcile both in a way legally permissible. Both can be reconciled and full meaning given to all the words used by the testator, if it be held that there was an absolute bequest in favour of the wife with a gift over to operate by way of defeasance, that is to say, if the son survived the wife, the absolute interest of the wife would be cut down and the son would take an absolute interest in the same. If that was the construction, the statement in the will relied upon by learned counsel for the appellant could also be reconciled with such a bequest. That statement recorded a wish on the part of the testator that his wife should reside in the house, for he wanted his minor son and wife to con-

1. L.R. 49 I.A. 25, 35 : 42 M.L.J. 492.

2. (1950) S.C.J. 575 : (1950) S.C.R. 766, 773.

tinue to live in his house. The second part of the statement also recorded a wish on his part that his wife should keep the property intact and hand over the same to his son, who would also be a full owner like himself. Be it as it may, the said statement could not detract from the clear words used earlier. If the argument of Learned counsel for the appellant be accepted, this Court would be re-writing the will for the testator and introducing words which were not there; it would be cutting down the meaning of the words which the testator designedly used to convey a larger interest to his wife. Where apparently conflicting disposition can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. If the construction suggested by Learned counsel be adopted, in the event of his son predeceasing the testator, there would be intestacy after the death of the wife. If the construction suggested by the respondent be adopted; in the event that happened it would not bring about intestacy, as the defeasance clause would not come into operation. That was the intention of the testator is also clear from the fact that he mentioned in the will that no other relation except his wife and son should take his property and also from the fact that though he lived for about a quarter of a century after the execution of the will, he never thought of changing the will, though his son had predeceased his wife.

Learned counsel for the appellant relied upon the decision of Varadachariar, J., in *Subbamma v. Ramanaidu*¹. There the testator created a limited interest in favour of the widow followed by gift over to grandchildren. In describing the bequest in favour of the widow, the testator used the word "Hakdar" meaning "Owner." Still the learned Judge held that the widow took only a women's estate and the grandchildren took the remainder. The learned Judge observed:

"To avoid such a possibility, the proper rule of construction has been held to be to take the will as a whole; and the presence of a gift over, which is not a mere gift by way of defeasance, has generally been held to be an indication that the prior gift was only a limited interest."

The learned Judge also relied upon the other circumstances of the will in coming to that conclusion. This decision accepted the same proposition which this Court has laid down in *Ram Gopal v. Nand Lal*², namely, that the entire document should be considered in arriving at the intention of the testator. No decision on the construction of a will can be of use in construing another document, unless all the important recitals are similar. A document will have to be construed on its own terms. In the circumstances of the present document, we have come to the conclusion that under the will the gift over in favour of the son is only by way of defeasance.

We cannot allow the learned counsel to raise the second contention, for it was not raised before the District Court, before Khosla, J., and before the division Bench of the High Court. It was raised before the Subordinate Judge, but the learned Subordinate Judge held, on the evidence, that the will had not been proved and indeed he came to the conclusion that the testator was not of sound mind on the date when the will was alleged to have been executed. The point raised a mixed question of fact and law and there are no exceptional grounds for deviating from the usual practice of this Court and allowing the appellant to raise this point here when he failed to do so in the two Courts below.

In the result, the appeal fails and is dismissed with cost. The appellant will pay the Court-fee on the memo. of appeal.

K.L.B. ¹

Appeal dismissed.

1. (1937) 1 M.L.J. 268 : A.I.R. 1937 Mad. 476, 477.

2. (1950) S.C.J. 572 : (1950) S.C.R. 766, 773.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Arjan Singh and others

.. Appellants*

v.

Narain Singh and others

.. Respondents.

Custom—Punjab—Jats—Customary Law—Punjab Laws Act, 1872, section 5—Descendants of adopted son—Right of inheritance to the estate of a member in the natural family—Special custom—Onus of proof.

When there is a conflict between the record of custom made in Rattigan's Digest of Customary Law and the local *Riwaj-i-am*, *prima facie*, the latter would prevail to the extent of the inconsistency and it would be for the person pleading a custom or incident thereof different from the custom recorded in the *Riwaj-i-am* to prove such custom or incident.

Question 76 in the *Riwaj-i-am* was directed to ascertain the right of the adopted son to inherit the estate of his natural father ; it did not seek elucidation on the right of the adopted son to inherit the estate of any collaterals of the natural father and the fact that in the answer it was recorded that to the estate which would devolve upon his adoptive father as a collateral of his natural father he has a right of inheritance, strongly supports the view that the village elders in replying to the question were only concerned with the right of an adopted son to inherit the property of his natural father and were not concerned to dilate upon any right to collateral succession in the natural family.

In the instant case, it is sufficient to observe that in Article 48 of Rattigan's Digest it is recorded that an heir appointed in the manner described (an adopted son) does not thereby lose his right to succeed to property in his family and nothing inconsistent therewith is shown to be recorded in the *Riwaj-i-am* of the District.

Appeals from the Judgment and Decree, dated 25th April, 1956 of the Punjab High Court in Civil Regular Second Appeals Nos. 158 and 159 of 1949 respectively.

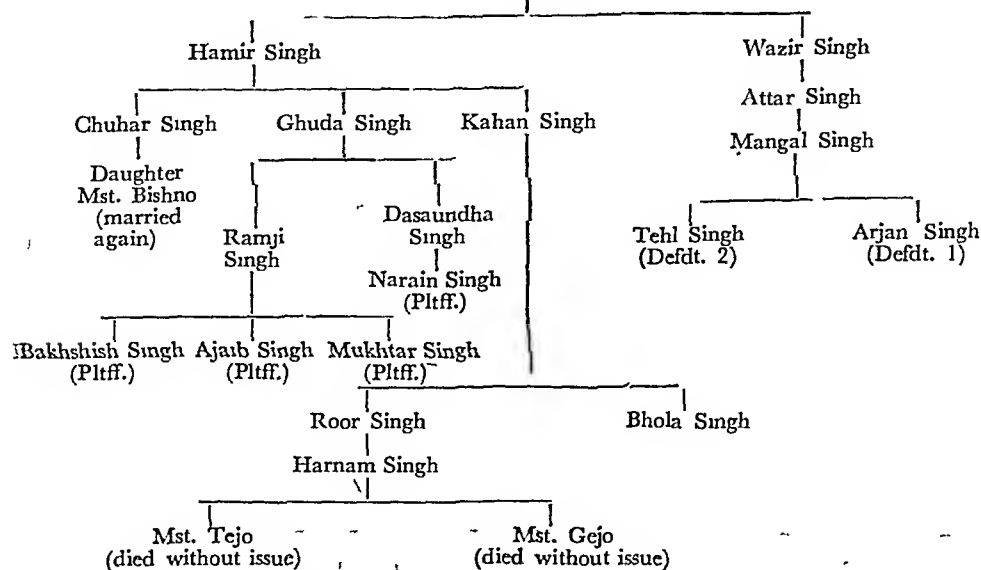
N. S. Bindra, Senior Advocate (K. L. Mehta, Advocate, with him), for Appellants (In both the Appeals).

Gurbachan Singh, Senior Advocate, (Harbans Singh and M.L. Kapur, Advocates with him), for Respondents (In C.A. No. 224 of 1961).

The Judgment of the Court was delivered by

Shah, J.—These appeals arise out of two suits relating to certain agricultural lands situate in Village Umri Ana, Tehsil Zira, District Ferozepore in the Punjab. The dispute relates to the right to inherit the estate of one Harnam Singh, who was the last male holder. The disputing parties are descended from Sahib Singh as disclosed by the following genealogy :—

Sahib Singh



* C. As. Nos. 223 and 224 of 1961.

Harnam Singh, grandson of Kahan Singh, died leaving him surviving two daughters Mst. Tejo and Mst. Gejo and no male lineal descendant. The property of Harnam Singh devolved upon his two daughters in equal shares. On the death of Mst. Tejo without issue the entire estate was entered in the name of Mst. Gejo by the revenue authorities. Mst. Gejo also died in 1942 without leaving any issue surviving her. By order dated 6th September, 1945, the Assistant Collector directed that the entire estate he entered in the name of Narain Singh, son of Dasaundha Singh and Bakhshish Singh, Ajaib Singh and Mukhtar Singh, sons of Ramji Singh—who will hereinafter be referred to collectively as 'the plaintiffs'. In appeal to the Collector of Ferozepore the order of the Assistant Collector was set aside and the estate was directed to be entered in the names of Tehl Singh and Arjan Singh, sons of Mangal Singh—who will hereinafter be referred to collectively as 'the defendants'. The Commissioner of the Division confirmed the order of the Collector.

The plaintiffs who are the descendants of Ghuda Singh then instituted suit No. 9 of 1947 in the Court of the Subordinate Judge, Zira, for a decree for possession of the estate of Harnam Singh, barring a small area of 8 Kanals and 11 Marlas—Khasra No. 325—which was in their possession. The defendants, who are the descendants of Wazir Singh in their turn commenced an action (Suit No. 13 of 1947) for possession of Khasra No. 325 against the plaintiffs. Each side claimed title to the estate of Harnam Singh according to the customary law applicable to the *Jats* residing in *Tehsil* Zira, District Ferozepore. It was the case of the plaintiffs that notwithstanding the adoption of Ghuda Singh by his maternal uncle Bhan Singh, Ghuda Singh's descendants were not excluded from inheritance to the estate of a member in the natural family of Ghuda Singh. It was submitted by the plaintiffs that the family of the plaintiffs and Harnam Singh was governed by *Zamindara Riway-i-am* (general custom obtaining amongst the Zamindars) by virtue of which a son adopted in another family and his descendants do not lose their right to inherit in their natural family, because by the adoption according to the custom of the community the adopted son does not completely sever his connections with his natural family. The defendants on the other hand claimed that in the District of Ferozepore every adoption in a Hindu family is 'formal' and according to the *Riway-i-am* of the District an adopted son is excluded from the right to inherit in his natural family. Consequently Ghuda Singh who was adopted by Bhan Singh could not inherit the estate of Hamir Singh, his adoption operating as a complete severance from the natural family. The sole dispute between the parties was therefore as to the customary law applicable to the rights of a son adopted in a *Jat* family residing in *Tehsil* Zira, District Ferozepore.

The two suits were consolidated for trial. The Subordinate Judge held that all ceremonies relating to adoption were performed and Ghuda Singh ceased to be a member of the family of his natural father according to the custom prevailing in the District, and the plaintiffs who were the descendants of Ghuda Singh could not inherit the estate of Hamir Singh. In so holding he relied upon the manual of *Riway-i-am* of Ferozepore District prepared in 1914, which, in his view, recorded that when any adoption in the District takes effect the adopted son stands 'transplanted to the family of the adopter.' In appeal the District Court Ferozepore, held that in the case of *Jats* of Ferozepore District by special custom prevailing in the District, the adopted son had the right to inherit collaterally in the family of his adoptive father only and could not inherit collaterally in his natural father's family. In Second Appeal the High Court of Punjab set aside the decree passed by the District Court. In the view of the High Court the record disclosed no evidence that the adoption of Ghuda Singh made by his maternal uncle Bhan Singh was formal and in the absence of any such evidence it must be presumed that the adoption was a customary appointment of an heir and not a formal adoption under the Hindu law, and that there was overwhelming authority in favour of the proposition that by reason of a customary adoption the adopted son and his descendants were not excluded from the right to inherit to collaterals in the natural family. The High Court accordingly held that the plaintiffs as grandsons in the male line

of Ghuda Singh were entitled to inherit the estate of Hamir Singh. With certificate of fitness granted by the High Court, these two appeals are preferred by the defendants.

It is common ground that Ghuda Singh was adopted some time before 1856 by Bhan Singh, his maternal uncle. The dispute between the parties has to be resolved by applying the customary law applicable to the parties, because section 5 of the Punjab Laws Act, 1872 which governs the parties provides that :

"In questions regarding succession special property of females, betrothal and marriage, divorce, dower, adoption, guardianship, minority, hasty, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be—

(a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;

(b) The Mohammadan Law in cases where the parties are Mohammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been notified by any such custom as is above referred to."

In *Daya Ram v. Soheli Singh*¹, Robertson, J., (at page 410) in dealing with the true effect of section 5 observed :

"In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further, to prove what the particular custom is. There is no presumption created by the clause in favour of custom ; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law, nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of customary law, nor any theory of custom or deduction from other customs which is to be a rule of decisions, but only 'any custom applicable to the parties concerned which is not..... ; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply ; if he fails to do so clause (b) section 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

This view was affirmed by the Judicial Committee of the Privy Council in *Abdul Hussain Khan v. Bibi Sona Dero and another*². In *Vaishno Ditti v. Rameshri and others*³, the Judicial Committee observed at page 421 ;

" * * * * * their Lordships are of opinion that in putting custom in the forefront, as the rule of succession, while leaving the particular custom to be established, as it necessarily must be, the Legislature intended to recognise the fact that in this part of India inheritance and the other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mohammadan law."

The pleadings also disclose an unanimity that the rights of the parties have to be adjudged in the light of the customary law applicable and not by the rules of Hindu Law. The relevant general custom which is applicable in the matter of adoption is to be found in Rattigan's Digest of Civil Law for the Punjab, 13th Edition, page 572 :

Article 48 :

"An heir appointed in the manner above described ordinarily does not thereby lose his right to succeed to property in his natural family as against collaterals, but does not succeed in the presence of his natural brothers."

Article 49 :

"Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place, inasmuch as the relationship established between him and the appointer is a purely personal one."

This adoption, according to Rattigan is irrevocable and an adopted son cannot relinquish his status. Article 52 sets out the rights of the adopted son. It states :

"The appointed heir succeeds to all the rights and interests held or enjoyed by the appointer, and semble, would succeed equally with a natural son subsequently born".

1. (1906) P.R.No. 110 (F.B.).

3. (1928) 55 M.L.J. 746 : L.R. 55 I.A.

2. (1918) 34 M.L.J. 48 : L.R. 45 I.A. 407 (421).

There is a long course of decisions in the High Court of Lahore and the High Court of Punjab in which it has been held that the relationship between the appointed heir and the appointer which is called adoption is purely a personal one and resembles the *Kritrima* form of adoption of Hindu Law : *Mela Singh v. Gurdas*¹. Sir Shadi Lal, C.J., observed in dealing with the effect of a customary adoption in the Punjab :

"The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is a purely personal one and does not extend beyond the contracting parties on either side".

Similarly in *Jagat Singh v. Ishar Singh*², it was held that the reservation as to the adopted son not succeeding in the presence of his brothers refers only to his succession to his natural father but does not apply to cases of collateral succession in his natural family. A similar view was expressed in *Kanshi Ram v. Situ and another*³ and *Rahmat v. Zileddar and another*⁴. In the last mentioned case it was stated :

"Under the general custom of the province, a person who is appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father. But the appointed heir and his lineal descendants have no right to succeed to the property of the appointed heir's natural father against the other sons of the natural father and their descendants. The appointed heir can succeed to the property of his natural father when the only other claimant is the collateral heir of the latter."

But it is urged on behalf of the defendants that the general custom applicable to the Punjab as recorded by Rattigan is shown to be superseded by proof of a special custom of the District recorded in the *Riwaj-i-am* of Ferozepore District prepared by Mr. Currie at the settlement of 1914, and reliance is placed upon answers to Questions 76 and 77 which deal with the effect of adoption. The Questions and the Answers recorded are :

"Question 76.—Does an adopted son retain his right to inherit from his natural father ? Can he inherit from his natural father if the natural father dies without other sons ?

Answer.—All agree that the adopted son cannot inherit from his natural father, except as far as regards such share of the property as would come to his adoptive father as a collateral. *Sodhis* however say that he can inherit his natural father's estate if the latter has no male descendants, while the *Nipals* say the adopted son inherits from both fathers.

Question 77.—Describe the rights of an adopted son to inherit from his adoptive father. What is the effect of the subsequent birth of legitimate sons to the adoptive father ? Will the adopted son take equal shares with them ? If natural legitimate sons be born subsequently to the adoption where the *chundawand* system of inheritance prevails, how will the share of the adopted son, whose tribe differs from that of the adoptive father, inherit from him ? Does an adopted son retain his own *got* or take that of his adoptive father ?

Answer.—An adopted son has exactly the same rights of inheritance from his adoptive father as a natural legitimate son. The inheritance would only be by *chundawand*, if that was the prevalent rule of the family.

The *Nipals*, *Rajputs*, *Arains*, *Moghals*, *Sayyads*, *Gujjars* and *Mohammadan Jats* state that if the adopted son is of different *got* he takes the *got* of his adoptive father ; while if he is of a different tribe, he cannot inherit.

As it is, as a rule aged men without hope of sons who adopt, cases of the birth of legitimate sons after adoption has taken place must be rare".

When there is conflict between the general custom stated in Rattigan's Digest of Customary Law and the *Riwaj-i-am* which applies to a particular area it has been held by this Court that the latter prevails. In *Jai Kaur and others v. Sher Singh and others*⁵, it was observed at page 979 :

"There is, therefore, an initial presumption of correctness as regards the entries in the *Riwaj-i-am* and when the custom as recorded in the *Riwaj-i-am* is in conflict with the general custom as recorded in Rattigan's Digest or ascertained otherwise, the entries in the *Riwaj-i-am* should ordinarily prevail except that as was pointed out by the Judicial Committee in *Mt. Subhani v. Nawab*⁶, that where, as in the present case, the *Riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weak, and only a few instances would suffice to rebut it."

1. I.L.R. 3 Lah. 362 (F.B.).

2. I.L.R. 11 Lah. 615.

3. I.L.R. 16 Lah. 214.

4. I.L.R. (1945) Lah. 504.

5. (1961) 2 S.C.J. 62; (1960) 3 S.C.R. 975 (979).

6. A.I.R. 1941 (P.C.) 21; L.R. 68 I.A. 1.

Therefore when there is a conflict between the record of custom made in Rattigan's Digest of Customary Law and the local *Riwaj-i-am*, *prima facie*, the latter would prevail to the extent of the inconsistency, and it would be for the person pleading a custom or incident thereof different from the custom recorded in the *Riwaj-i-am* to prove such custom or incident. Attention must therefore be directed to the question whether there is in fact any inconsistency between the custom recorded in Rattigan's Digest of Customary Law and the relevant entries in the *Riwaj-i-am*. The general custom recorded in Rattigan's Digest is apparently this : a person adopted according to the custom of the community *i.e.*, who is appointed as an heir to inherit the property of a person outside the family does not, by virtue of such appointment, lose his right to inherit the property in his natural family except the right to inherit the property of his natural father when there are natural brothers. The natural brothers would take the property to the exclusion of such an adopted son and his descendants. *Question 76* in the *Riwaj-i-am* primarily refers to the right of an adopted son to retain his right to inherit the property of his natural father and the answer recorded is that the adopted son cannot inherit the property of the natural father, except such property as would devolve upon his adoptive father as a collateral (of the adopted son's natural father). It is to be noticed that the question was directed to ascertain the right of the adopted son to inherit the estate of his natural father : it did not seek elucidation on the right of the adopted son to inherit the estate of any collaterals of the natural father, and the fact that in the answer it was recorded that to the estate which would devolve upon his adoptive father as a collateral of his natural father he has a right of inheritance, strongly supports the view that the village elders in replying to the question were only concerned with the right of an adopted son to inherit the property of his natural father and were not concerned to dilate upon any right to collateral succession in the natural family. The answer to *Question 77* also supports this view. When asked to describe the rights of an adopted son to inherit the estate of his adoptive father, they replied that the adopted son had exactly the same rights of inheritance from his adoptive father as a natural legitimate son.

Mr. Bindra appearing on behalf of the defendants submitted that *Questions 76 and 77* were intended to ascertain the custom of the District relating to the rights of the adopted son in his natural family and the family of his adoptive father and the answers must be read in that light. We are unable to accept this suggested interpretation of *Questions 76 and 77* and the information elicited thereby. The *Riwaj-i-am* appears to have been carefully compiled by officers of standing and experience and it is clear that they made a limited enquiry about the rights of an adopted son to inherit the property of his natural father and of his adoptive father. There is undoubted by some conflict between the custom recorded in Rattigan's Digest and the custom in the *Riwaj-i-am*. Whereas in Rattigan's Digest it is recorded that an heir appointed in another family does not succeed to his natural father in the presence of his natural brothers, in the *Riwaj-i-am* it is recorded that the adopted son does not directly inherit the estate of his natural father in any event. But we are not concerned with that inconsistency in this case. It is sufficient to observe that in *Article 48* of Rattigan's Digest, it is recorded that an heir appointed in the manner described (an adopted son) does not thereby lose his right to succeed to property in his family : and nothing inconsistent therewith is shown to be recorded in the *Riwaj-i-am* of the District.

Mr. Bindra contended that in any event there is clear evidence of instances of devolution of property in the family of the parties indicating that a son adopted in another family was totally excluded from inheritance in the natural family. Counsel relied upon Exhibit D-5 an extract from the register of mutations relating to certain agricultural lands in Village Umri Ana. It appears from that extract that on the death of Hamir Singh the estate was in the first instance entered in the names of his three sons. But Salig Ram, Patwari of the village, made a report on 28th May, 1884 that Kahan Singh and Chuhan Singh (two of the sons of Hamir

Singh) claimed that Ghuda Singh had never been in possession of the $\frac{1}{3}$ rd share of the *Khata* entered in his name and that Ghuda Singh himself had admitted that he had no concern with the *Khata* in question and that his name should be removed. On that report the Assistant Collector ordered that the lands be entered in the names of Kahan Singh and Chuhar Singh and that the name of Ghuda Singh be removed from the mutation entry and that the *Jamabandi* papers be altered accordingly. But this instance of exclusion of Ghuda Singh from the right to participate in the estate of his father is consistent with the statement of custom recorded in Rattigan's Digest. It is expressly recorded in *Article 48* that an appointed heir does not thereby lose his right to succeed to property in his natural family, as against collaterals, but he does not succeed in the presence of his natural brothers. Kahan Singh and Chuhar Singh were brothers of Ghuda Singh and Ghuda Singh having been adopted could not, according to the custom recorded in Rattigan's Digest, inherit his father's estate in the "presence of his brothers."

The other instance relied upon by counsel is about the devolution of the estate of Chuhar Singh on the re-marriage of his daughter Bishno. On the death of Chuhar Singh it appears that his property was entered in the name of his daughter Bishno, and when Bishno contracted a *Karewa* marriage according to the custom prevalent in the community, the estate held by her was entered in the name of Rura Singh and Bhola Singh, sons of Kahan Singh. In the register of mutations Exhibit D-1 it is recorded that Ghuda Singh who was the *lambardar* appeared before the Tehsildar and identified Mst. Bishno and stated that she had contracted *Karewa* marriage with Jawala Singh and further admitted that Rura Singh and Bhola Singh were entitled to take her property, and pursuant to this statement the Tehsildar directed that mutation regarding succession be sanctioned in favour of Rura Singh and Bhola Singh in equal shares. This instance also, in our judgment, does not support any case of departure from the custom recorded in Rattigan's Digest. It is clear from the genealogy and the extract of the Register of Mutations Exhibit D-1 that the occasion for making an entry of mutation was the re-marriage of Bishno. Mr. Bindra submitted that according to the custom of the community a daughter inheriting property from her father would on marriage be divested of the property, which would devolve upon the collaterals of her father, and according to that custom when on the re-marriage of Bishno the succession opened, Ghuda Singh was on his own admission excluded. This, counsel submitted, was a strong instance supporting a departure from the custom recorded in Rattigan's Digest. But if by virtue of the custom prevalent in the community, as asserted by Mr. Bindra on her marriage Bishno would lose her interest in the property of her father, it is difficult to appreciate how she acquired title or continued, contrary to that custom, to remain owner of the property of her father after her first marriage. It is clear that it was not because of her marriage, but on re-marriage, that the property was alleged to have devolved upon Rura Singh and Bhola Singh. Why Bishno did not forfeit her right to the property on her marriage and forfeited her right thereto on re-marriage has been left in the obscurity.

The learned Judges of the High Court held that the mere circumstance that Ghuda Singh permitted the estate to go to the descendants of Kahan Singh was not by itself sufficient to establish the custom set up by the defendants and uncontested instances were of little value in establishing a custom. They observed that the instance might have received considerable reinforcement if it had been shown that Ghuda Singh or any of his descendants had inherited collaterally in the family of Bhan Singh but except succession of Ghuda Singh to the estate of Bhan Singh which is in accordance with the general custom no proof of collateral succession was established, and the single instance of Chuhar Singh's estate devolving upon the descendants of Kahan Singh with the consent of Ghuda Singh does not establish any custom contrary to what is stated in Rattigan's Digest. We are unable to disagree with the view so expressed.

On that view of the case, these appeals fail and are dismissed with costs.

K.L.B.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A.K. SARKAR, K.N. WANCHOO AND K.C. DAS GUPTA, JJ.

M/s. Daluram Pannalal Modi

.. Appellant*

v.

The Assistant Commissioner of Sales Tax, Indore and others .. Respondents.

Madhya Pradesh General Sales Tax Act (II of 1959), section 19 (1)—Re-assessment by Assistant Commissioner under powers delegated to him—Assistant Commissioner has power to re-assess on his own satisfaction that sales had escaped assessment.

Section 19 (1) of the Madhya Pradesh General Sales Tax Act (1958) no doubt required that the Commissioner had to be satisfied that sales had escaped assessment before he could proceed to exercise his power to re-assess. But it cannot be said that this requirement imposed any duty on the Commissioner. It was only a condition or limitation of his power. Even if it was a duty it was a duty which had been created only as an adjunct to the exercise of the power, a duty which passed necessarily with the delegation of the power. Accordingly in the instant case the Assistant Commissioner, as the delegate of the power to re-assess duly exercised the power on his own satisfaction that sales had escaped assessment. The delegation of a power would take with it all the conditions precedent attached to it whatever be their number.

The previous assessment under the 1950 Act having been made on a non-existent person and so a nullity will not stand in the way of the re-assessment of the appellant at all under the 1958 Act.

Appeal by Special Leave from the Judgment and Order dated 5th April, 1962, of the Madhya Pradesh High Court in M.P. No. 114 of 1962.

U. M. Trivedi, Senior Advocate, (*Shanti Swarup Khanduja* and *Ganpat Rai*, Advocates, with him), for Appellant.

M. Adhikari, Advocate-General, for the State of Madhya Pradesh, (*I. N. Shroff*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Sarkar, J.—The appellant had been assessed to sales tax for the year 1957-58 under the Madhya Bharat Sales Tax Act, 1950. This Act was repealed on 1st April, 1959 by the Madhya Pradesh General Sales Tax Act, 1958. On 31st December, 1960, a notice was issued to the appellant by an Assistant Commissioner of Sales Tax under the 1958 Act wherein it was stated,

“I am satisfied that your sale during the period from 1st April, 1957 to 31st March, 1958.... has escaped assessment and thereby rendered yourself liable to be re-assessed under section 19 (1) of the Act.”

Pursuant to this notice fresh assessment proceedings were started by the Assistant Commissioner in respect of the sales in the year 1957-58 and on 31st March, 1961, he made an order imposing an additional tax on the appellant of Rs. 31,250 for that year and a penalty of Rs. 15,000. The appellant moved the High Court of Madhya Pradesh for a writ of *certiorari* to quash the order but was unsuccessful. It has now appealed to this Court against the judgment of the High Court.

We will first set out the material portion of section 19 (1) of the Act of 1958 under which the assessment was made :

“Where an assessment has been made under this Act and the Commissioner, in consequence of any information which has come into his possession, is satisfied that any sale or purchase of goods chargeable to tax under this Act, during any year..... has escaped assessment..... the Commissioner may..... after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed, in such manner as may be prescribed, to re-assess the tax payable on such sale or purchase and the Commissioner may direct that the dealer shall pay, by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount.”

It is necessary also to refer to section 30 of the Act which authorises the Commissioner to “delegate any of his powers and duties under this Act”, subject to certain restrictions and exceptions which do not require consideration in this case, to Assistant

Commissioners and certain other officers. The Commissioner made an order under this section on April 1, 1959 delegating to Assistant Commissioners his "powers and duties specified in column (3) of the table" set out in the order. That column was headed "Description of Powers" and contained the following :

"To make an assessment or re-assessment of tax or penalty. and to exercise all other powers under sections 18, 19 and 22."

It was said that the power to re-assess conferred by section 19 (1) on the Commissioner was subject to various duties one of which was that he had to be satisfied that sales had escaped assessment, without the performance of which duties the power could not be exercised. It was contended that though provision had been made by section 30 for the delegation of duties, the Commissioner had by his order of 1st April, 1959, delegated only his power under section 19 but not the duties. Therefore, it was argued, that the Assistant Commissioner to whom the power had been delegated, could validly exercise that power only after the Commissioner had been satisfied personally that sales had escaped assessment. It was lastly said that as the Assistant Commissioner had exercised the power to re-assess on his own satisfaction that sales had escaped assessment, the exercise of the power was void.

Section 19 (1) no doubt required that the Commissioner had to be satisfied that sales had escaped assessment before he could proceed to exercise his power to re-assess. It is true that without such satisfaction there could be no re-assessment. But we do not think that by this requirement the section imposed any duty on the Commissioner. The Commissioner's satisfaction was necessary only if he wanted to exercise his power to re-assess and was really a condition or limitation of the exercise of that power. Apart from the exercise of such power it had no purpose and no existence. Even if the requirement as to satisfaction was to be considered as a duty, it was a duty which had been created only as an adjunct to the exercise of the power, a duty which passed necessarily with the delegation of the power. That seems to us to be also commonsense for when a power is delegated it is intended that the delegate would exercise it and therefore it must have been intended that he would perform all the conditions precedent to the exercise of the power.

The view that we have taken of this case was taken by the Judicial Committee of a similar statute in the case of *Mungoni v. Attorney-General*¹ and that case was cited with approval by this Court in *Hazrat Syed Shah Mastarshid Ali Al Ouadari v. Commissioner of Wakfs, West-Bengal*², where it was observed,

"Where powers and duties are inter-connected and it is not possible to separate one from the other in such wise that powers may be delegated while duties are retained and *vice versa*, the delegation of powers takes with it the duties."

The duty of being satisfied—if at all it was one—being inseparably connected with the power to re-assess and passing to a delegate along with it, was not a duty which could be independently delegated and was not, therefore, a duty the delegation of which could be made under section 30. We, therefore, think that the Assistant Commissioner, as the delegate of the power to re-assess, duly exercised the power on his own satisfaction that sales had escaped assessment.

Then it was said that *Mungoni's case*¹ and the cases taking the same view, some of which were mentioned in the judgment of the High Court, were of no assistance for the statutes in those cases required only one thing to be done before the power conferred could be exercised, whereas section 19 (1) of the Act of 1958 required a number of things to be so done. It was, therefore, contended that it could not be said in the present case that the things which had to be done before the power could be exercised were not duties which could be delegated under section 30. In *Mungoni's case*¹ no doubt there was only one condition precedent and we will assume that in the cases referred to in the judgment of the High Court, the position was the same. We will also assume that sub-section (1) of section 19 required a number of things to be done before the power to re-assess could be exercised though, as at present advised, we

1. L.R. (1960) A.C. 336.

2. (1962) 2 S.C.J. 587: A.I.R. (1961) S.C. 1095.

doubt if it did. We are however wholly unable to appreciate how the number of conditions precedent could lead to the view that they were independent duties which could be separately delegated. It seems to us that in spite of their number, they remain nonetheless conditions precedent and therefore conditions or limitation of the exercise of the power. They had, like a single condition precedent, no independent existence. If in the case of a single condition precedent it has to be held on the authority of *Mungoni's case*¹ that the requirement of its performance passed with the delegation of the power to which it was attached, we think that a delegation of a power would take with it all the conditions precedent attached to it whatever be their number. We are unable to distinguish the present case from *Mungoni's case*¹.

The other objection to the validity of the order is that it was in respect of sales which had earlier been assessed under the Act of 1950 as sales by one Gajanand Satyanarayan and could not therefore be assessed again. This earlier assessment had been cancelled by an order made under section 39 (2) of the Act of 1958. But it was said that that order could not cancel the assessment which was under the 1950 Act, for under section 39 (2) only an order under the 1958 Act could be cancelled. It seems to us that in order to uphold the validity of the re-assessment order made in this case it is not necessary that the assessment order made on Gajanand Satyanarayan should have been cancelled. We will assume that the sales covered by the order against Gajanand Satyanarayan were the same as those with which the order in hand is concerned. In the re-assessment proceedings however it was found as a fact that Gajanand Satyanarayan was a name only and that no real person bearing that name ever existed. That finding cannot be challenged in the present proceedings and that being so, it seems to us that the assessment order upon Gajanand Satyanarayan was a nullity. Obviously, no assessment could be made under the Act on a non-existent person. If that order was a nullity and the learned counsel has not been able to show how it could have been otherwise it could not stand in the way of the re-assessment of the appellant at all. The second challenge to the impugned order must, therefore, also be rejected.

Learned counsel for the appellant had sought to raise two other points but he was not permitted to do so because these points were not mentioned in the petition for the writ nor raised at any earlier stage. We will however state them here but without expressing any opinion of our own as to their tenability. The first of these points was that under section 19 (1) of the 1958 Act only those sales could be re-assessed which were chargeable to tax under that Act and the sales brought to tax under the present order were of sugar, a commodity the sale of which was not chargeable under the Act. The other point was that penalty had been imposed by the impugned order under section 14 of the Act of 1950 but this was illegal since the 1950 Act had been repealed and the right to impose a penalty under the repealed Act had not been saved by the saving section, namely, section 52.

In the result this appeal must fail and it is, therefore, dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, M. Hidayatullah and J. C. Shah, JJ.

Meenglas Tea Estate

— Appellant *

v.

The Workmen

— Respondents.

Industrial dispute—Dismissal of workmen for misconduct—Domestic enquiry—Procedure to be followed—Tribunal—Jurisdiction.

It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a

fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him.

[In the instant case neither was any witness examined nor was any statement made by any witness tendered in evidence. The enquiry such as it was, was made by two of the officials of the company (who were alleged to have been assaulted by the workmen). Such officials were not only in the position of Judges but also of prosecutors and witnesses. There was no opportunity to the persons charged to cross-examine them and they drew upon their own knowledge of the incident and merely cross-examined the persons charged. This was such a travesty of the principles of natural justice that the Tribunal was justified in rejecting the finding and asking the Company to prove the allegations against such workmen *de novo* before it.]

Having regard to the lapse of time and the number of workmen involved the Tribunal was justified in requiring at least two witnesses to incriminate a workman. It is not a question of error in applying section 134 of the Evidence Act. It is rather a question of proceeding with caution which was justified in the circumstances of the case.

Appeal by Special Leave from the Award, dated 3rd April, 1961, of the Seventh Industrial Tribunal, West Bengal, in Case No. VIII-303 of 1960.

B. Sen, Senior Advocate, (*S. C. Mazumdar*, Advocate and *D. N. Mukherjee*, Advocate for *B. N. Ghosh*, Advocate, with him), for Appellant.

Janardan Sharma, Advocate, for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, J.—By this appeal filed with the Special Leave of this Court, by the Meenglas Tea Estate against its Workmen, the Company seeks to challenge an award, dated 3rd April, 1961, pronounced by the Seventh Industrial Tribunal, West Bengal. The Order of Reference was made by the Government of West Bengal as far back as 29th October, 1957, in respect of the dismissal of 44 workmen. The issue which was referred was as follows :—

“Whether the dismissal of the workmen mentioned in the attached list is justified? What relief by way of reinstatement and/or compensation are they entitled to?”

From 5th November, 1957, to 17th August, 1960, this Reference remained pending before the First Labour Court. It was then transferred to the Seventh Industrial Tribunal and the latter made the impugned award on 3rd April, 1961. By the time the award was made two of the workmen (Nos. 12 and 37) had died and four had been re-employed (Nos. 31, 33, 34 and 35). One of the workmen (No. 22) was not found to be a workman at all. The Tribunal held that the orders of dismissal of fourteen workmen were justified though retrospective effect could not be given to the orders. The Company was ordered to re-instate the remaining workmen and to pay them compensation in some cases (but not all) amounting to three months' wages. In the present appeal the Company seeks to challenge the award regarding 13 of those workmen who have been ordered to be reinstated. Of these workmen the cases of three fall to be considered separately and those of the remaining ten can be considered together. We shall now give the facts from which the Reference arose.

The appellant Meenglas Tea Estate in Jalpaiguri District of West Bengal is owned by Duncan Brothers, Ltd. The workers belong to the Zilla Chabagan Workers' Union, Malbazar, District Jalpaiguri. On 18th January, 1956, there was an ugly incident in which a group of workmen assaulted the Manager, Mr. Marshall and his two Assistant Managers Mr. Nichols and Mr. Dhawan. This happened one morning in a section of the tea gardens where about two hundred workmen had surrounded Mr. Nichols and were making a violent demonstration. First Mr. Dhawan and soon after Mr. Marshall arrived on the scene and the workmen surrounded them also. In the assault that followed these three officers were wounded—Mr. Marshall seriously. A criminal case was started against some of the rioters but we are not concerned with it. The Company also started proceedings against some workmen. It first issued a notice of suspension which was to take effect from 6th February, 1956, and then served charge-sheets on a large number of workmen charging them with participation in the riot. The workmen replied denying

their complicity. The Company then held enquiries and ordered the dismissal of a number of workmen with effect from 18th January, 1956. A sample order of dismissal is exhibited as Annexure F in the case. In the enquiry before the Tribunal the Union admitted the incident though it said that it was caused by provocation on the part of the Management. The Union, however, denied that any of the workmen who were charged was concerned in the affray pointing out that none of these workmen was prosecuted by the Police. The enquiry was held by Mr. Marshall and Mr. Nichols and the record of the proceedings is marked Exhibits 17 and 18 series. That record was produced before us by the appellant for our perusal. It was admitted before us that there was no further record of evidence for the Company as none was recorded. Exhibits 17 and 18 series are the answers of the workmen to the charges against them and such replies as they gave to questions put to them in cross-examination.

The Tribunal held that the enquiry was vitiated because it was not held in accordance with the principles of natural justice. It is contended that this conclusion was erroneous. But we have no doubt about its correctness. The enquiry consisted of putting questions to each workman in turn. No witness was examined in support of the charge before the workman was questioned. It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In the present case neither was any witness examined nor was any statement made by any witness tendered in evidence. The enquiry, such as it was, was made by Mr. Marshall or Mr. Nichols who were not only in the position of Judges but also of prosecutors and witnesses. There was no opportunity to the persons charged to cross-examine them and indeed they drew upon their own knowledge of the incident and instead cross-examined the persons charged. This was such a travesty of the principles of natural justice that the Tribunal was justified in rejecting the findings and asking the Company to prove the allegation against each workman *de novo* before it.

In the enquiry which the Tribunal held the Company examined five witnesses including Mr. Marshall, Mr. Nichols and Mr. Dhawan, who were the eye-witnesses. In view of the fact that the enquiry was being made into an incident which took place four and a half years ago the Tribunal in assessing the evidence held that it would not accept that any workman was incriminated unless at least two witnesses deposed against him. Some of the workmen got the benefit of this approach and it is now contended that the Tribunal was in error in insisting upon corroboration before accepting the evidence of a single witness. Reference in this connection is made to section 134 of the Indian Evidence Act (I of 1872) which lays down that no particular number of witnesses shall in any case be required for the proof of any fact. It is not a question of an error in applying the Evidence Act. It is rather a question of proceeding with caution in a case where admittedly many persons were involved and the incident itself took place a very long time ago. The Tribunal acted with caution and did not act upon uncorroborated testimony. It is possible, that the evidence against some of the persons to whom the benefit has gone, might be cogent enough for acceptance, but the question is not one of believing a single witness in respect of any particular workman but of treating all workmen alike and following a method which was likely to eliminate reasonable chances of faulty observation or incorrect recollection. On the whole, it cannot be said that the Tribunal adopted an approach which made it impossible for the company to prove its case. It followed a standard which in the circumstances was prudent. We do not think that for this reason an interference is called for. Since no other point was argued the appeal of the Company in respect of the ten workmen,

who were alleged to be concerned in the occurrence of 18th January, 1956, must be dismissed.

This brings us to the consideration of the three special cases. They concern Dasarath Barick (No. 25), Lea Bichu (No. 26) and Nester Munda (No. 27). Dasarath Barick was said to have threatened the loyal workers and to have prevented them from work on 15th March, 1956. Lea Bichu was said to have forced the chowkidar to hand over the keys of the gate to him on the same day and to have locked the gate with a view to hampering the movement of workmen. The Tribunal held that the enquiry in both the cases was not a proper enquiry and the conclusion was not acceptable. Here, again, no witness was examined in the enquiry to prove the two occurrences and even before the Tribunal there was no evidence against them except the uncorroborated testimony of Mr. Marshall. No worker was examined to prove that he was threatened by Dasarath Barick or to show that it was Lea Bichu who had taken the keys from the chowkidar and locked the gate. In view of these circumstances the Tribunal was justified in not accepting the findings which proceeded almost on no evidence. We agree with the Tribunal that no case was made out before the Tribunal for the dismissal of Dasarath Barick and Lea Bichu.

The last case is of Nester Munda who is the Secretary of the Union. It was alleged against him that on 16th January, 1956, he had abused Mr. Nichols and had demonstrated at the head of a hostile group of workmen. Here, again, no proper enquiry was held and the conclusion reached at the enquiry by the Company was not acceptable. The Tribunal, therefore, enquired into the case for itself. Mr. Nichols and Mr. Dhawan gave evidence which the Tribunal was not prepared to accept. It pointed out that their testimony conflicted on vital points. Since the Tribunal had the opportunity of hearing and seeing Mr. Nichols and Mr. Dhawan we should be slow to reach a conclusion different from that of the Tribunal. In addition, in such cases, it is not the practice of this Court to enter into evidence with a view to finding facts for itself. Following this well-settled practice we see no reason to interfere with the conclusion of the Tribunal.

The result is that the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Union of India and another

.. *Appellants**

v.

Sri Ladulal Jain

.. *Respondent.*

Civil Procedure Code (V of 1908), section 20 (a) and Explanation II—Scope—Union of India running Railways—If carries on business—Headquarters of Northern Frontier Railway situated at Pandu within jurisdiction of Court at Gauhati in State of Assam—Cause of action in respect of non-delivery of consignment booked from Kalyanganj station in West Bengal for carriage to Kanki station in Bihar (both of the same railway)—Territorial jurisdiction of the Court at Gauhati.

Running of railways is a business. The fact as to who runs it and with what motive cannot affect it. The fact that the Government runs the railways for providing quick and cheap transport for people and goods and for strategic reasons will not convert what amounts to the carrying on of a business into an activity of the State as a sovereign body. The Union of India running the railways can be sued in the Court of the Subordinate Judge of Gauhati within whose territorial jurisdiction the headquarters of the Northern Frontier Railway run by the Union is situated (at Pandu in the Assam State) in respect of non-delivery of a consignment of goods booked from Kalyanganj station (in West Bengal) for carriage to Kanki station (in Bihar) both the stations being in Northern Frontier Railway.

Appeal by Special Leave from the Judgment and Order dated 10th April, 1961 of the Assam High Court in Civil Revision No. 10 of 1961.

D. R. Prem, Senior Advocate—(*P. D. Menon*, Advocate, for *R. N. Sachthy*, Advocate, with him), for Appellants.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, is directed against the Order of the High Court of Assam rejecting the revision application, under section 115 of the Code of Civil Procedure, hereinafter called the Code, of the appellants against the Order of the Additional Subordinate Judge, Gauhati, in a money suit to the effect that he had jurisdiction to try the suit.

The contention of the appellants is that this view of the Subordinate Judge, confirmed by the High Court, is wrong.

To appreciate the contention for the appellants, the facts of the case may be stated. The suit was instituted by the plaintiff-respondent against the Union of India and the Northern Frontier Railway represented by the General Manager, having its headquarters at Pandu. It related to a claim for recovery of a sum of Rs. 8,250 on account of non-delivery of the goods which had been consigned to the plaintiff's firm run under the name and style of M/s. Ladu Lal Jain. The consignment consisted of 134 bags of rice and was booked from Kalyanganj Station of defendant No. 2 for carriage to Kanki Station of the same defendant on 13th April, 1958. The goods consigned were not delivered to the plaintiff and hence the suit, after serving a notice under section 77 of the Indian Railways Act on the defendant railway and also serving a notice under section 80 of the Code. It was alleged in the plaint that the cause of action arose at Pandu within the jurisdiction of the Court at Gauhati, the place where notice under section 80 of the Code was duly served upon the defendant railway and that the suit was filed in the Court within the jurisdiction of which the defendant railway had its principal place of business by virtue of its headquarters being at Pandu. The two defendants filed a joint written statement.

Kalyanganj is in West Bengal and Kanki is in the State of Bihar. Gauhati is in the State of Assam. It was contended *inter alia* that Gauhati Court had no territorial jurisdiction to try the suit as neither of the aforesaid Railway Stations was within its jurisdiction and that the consignment never travelled within any part of the State of Assam and therefore the cause of action could not arise within the jurisdiction of any Court in Assam. It was further contended that mere service of notice, which was not admitted, on the defendants at a place within the jurisdiction of the Court, could not vest territorial jurisdiction on it and that defendant No. 1, the Union of India, had no principal place of business at Pandu or any other place within the jurisdiction of the Court, its headquarters office being at New Delhi. It was also stated that defendant No. 2 is owned and managed by defendant No. 1, that the office of defendant No. 2 at Pandu was also owned and controlled by defendant No. 1 and that the office at Pandu was a branch office of the Union of India which was controlled by defendant No. 1 from New Delhi.

Relying on the case reported as *P. C. Biswas v. Union of India*¹, the trial Court decided the preliminary issue about jurisdiction against the defendants holding that the principal place from which the railway administration in a particular area is carried on is the principal place of business for the purpose of section 20 of the Code. The single Judge of the High Court rejected the revision also on the basis of the same decision of his Court.

The territorial jurisdiction of a Court is in general determined by the provisions of section 20 of the Code which reads :

"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution ; or

(c) the cause of action, wholly or in part, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in India or in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

The principle behind the provisions of clauses (a) and (b) of section 20 is that the suit is to be instituted at a place where the defendant will be able to defend the suit without undue trouble.

The expression 'voluntarily resides or personally works for gain' cannot be appropriately applied to the case of the Government. The Government can however carry on business. The mere fact that the expression, 'carries on business' is used along with the other expressions, does not mean that it would apply only to such persons to whom the other two expressions regarding residence or of personally working for gain would apply.

The sole contention raised for the appellants in this Court is that the running of railways by the Union of India cannot be said to amount to its carrying on business; and that therefore the fact that the headquarters of the Northern Frontier Railway Administration is at Pandu within the jurisdiction of the Court at Gauhati does not give the Court jurisdiction under section 20 of the Code.

The contention is based on the reasoning that any undertaking run by the Government, even if it amounts to the carrying on of a business when run by a private individual, would not be the carrying on of business by the Government if there was no element of profit-making in it. There is no allegation in the written statement that the Government is not running railways for profit. No issue was framed about it. The Court below recorded no decision on the point. It cannot be presumed that the Government is not making a profit from its running the railways in the country or is not running it with a profit motive.

The fact that the Government runs the railways for providing quick and cheap transport for people and goods and for strategic reasons will not convert what amounts to the carrying on of a business into an activity of the State as a sovereign body.

Article 298 of the Constitution provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and clause (6) of Article 19 provides that nothing in sub-clause (g) of clause 1 of that Article shall prevent the State from making any law relating to the carrying on by the State or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. These provisions clearly indicate that the State can carry on business and can even exclude citizens completely or partially from carrying on that business. Running of railways is a business. That is not denied. Private companies and individuals carried on the business of running railways, prior to the State taking them over. The only question then is whether the running of railways ceases to be a business when they are run by Government. There appears to be no good reason to hold that it is so. It is the nature of the activity which defines its character. Running of railways is such an activity which comes within the expression 'business'. The fact as to who runs it and with what motive cannot affect it.

This Court had occasion to determine the nature of certain activities of Government. The rationale of those cases is a good guide for determining the point before us. In *State of Bombay v. The Hospital, Mazdoor Sabha*¹, the question was whether the relevant provisions of the Industrial Disputes Act, 1947, applied to the group of hospitals run by the State of Bombay and whether they are 'industry' within

the meaning of that Act. The decision of the question depended on the interpretation of the definition of 'industry' prescribed by section 2 (j) of the Act. This section provides that industry means any business, trade, undertaking, etc., of employers. In considering the question it became necessary to enquire whether that activity, i.e., the running of the hospitals, would be an undertaking if it is carried on by a private citizen or a group of private citizens. It was held that if a hospital is run by private citizens for profits, it would be an undertaking very much like the trade or business in their conventional sense. It was observed at page 878 :

"Thus the character of the activity involved in running a hospital brings the institution of the hospital within section 2 (j). Does it make any difference that the hospital is run by the Government in the interpretation of the word 'undertaking' in section 2 (j) ? In our opinion, the answer to this question must be in the negative. It is the character of the activity which decides the question as to whether the activity in question attracts the provision of section 2 (j) ; who conducts the activity and whether it is conducted for profit or not do not make a material difference."

To similar effect were the observations in *The Corporation of the City of Nagpur v. Its Employees*¹ where it was said :

"If a service rendered by an individual or a private person would be an industry, it would equally be an industry in the hands of a corporation."

It was earlier said at page 960 :

"Monetary considerations for service is, therefore, not an essential characteristic of industry in a modern State."

"Barring the regal functions of a municipality, if such other activities of it, if undertaken by an individual, would be industry, then they would equally be industry in the hands of a municipality."

Lastly, in *Satya Narain v. District Engineer, P. W. D.*², the question for determination was whether plying motor buses by the Government by way of commercial activity amounts to its running it as a public service. In determining this question, this Court observed at page 1163 :

"It is undoubtedly not easy to define what is 'public service' and each activity has to be considered by itself for deciding whether it is carried on as a public service or not. Certain activities will undoubtedly be regarded as public services, as for instance, those undertakings in the exercise of the sovereign power of the State or of Governmental functions. About these there can be no doubt. Similarly a pure business undertaking though run by the Government cannot be classified as public service. But where a particular activity concerns a public utility a question may arise whether it falls in the first or the second category. The mere fact that that activity may be useful to the public would not necessarily render it public service. An activity however beneficial to the people and however useful cannot, in our opinion, be reasonably regarded as public service if it is of a type which may be carried on by private individuals and is carried on by Government with a distinct profit motive. It may be that plying stage carriage buses even though for hire is an activity undertaken by the Government for ensuring the people a cheap, regular and reliable mode of transport and is in that sense beneficial to the public. It does not, however, cease to be a commercial activity if it is run with profit motive. Indeed even private operators in order to attract custom are also interested in providing the same facilities to public as the Government undertaking provides. Since that is so, it is difficult to see what difference there is between the activity carried on by private industrialists and that carried on by Government. By reason of the fact that a commercial undertaking is owned and run by the State it does not *ipso facto* become a 'public service.'"

This case simply held that commercial activity carried on with profit motive cannot be held to be 'public service'. It does not hold that such activity carried on by Government will not be 'business' if conducted without profit motive.

We are of opinion that 'profit element' is not a necessary ingredient of carrying on business, though usually business is carried on for profit. It is to be presumed that the Railways are run on a profit, though it may be that occasionally they are run at a loss.

The case reported as *Director of Rationing and Distribution v. the Corporation of Calcutta and others*³, relied on for the appellants is really of no help to them. It was in connection with the sovereign activities of the State that it was said that the State was not bound by any statute unless the statute provided to that effect in express terms or by necessary implication. The contention that the Government

1. (1960) 2 S.C.R. 942, 962.

3. (1961) 1 S.C.R. 158.

2. A.I.R. 1962 S.C. 1161.

could not get the benefit of this law in connection with its business activities was neither repelled nor considered. It was held to have no foundation as there was nothing on the record that the Food Department of the Government of West Bengal by undertaking rationing and distribution of food on a rational basis had embarked upon any trade or business and, in the absence of any such indication, it appeared that the Department was discharging the elementary duty of a sovereign to ensure proper and equitable distribution of available food stuffs with a view to maintaining peace and good government.

In view of what we have said above, we hold that the Union of India carries on the business of running railways and can be sued in the Court of the Subordinate Judge of Gauhati within whose territorial jurisdiction the headquarters of one of the railways run by the Union is situated. We accordingly dismiss the appeal with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Sri Athmanathaswami Devasthanam

.. Appellant *

v.

K. Gopalaswami Ayyangar

.. Respondent.

Madras Hindu Religious Endowments Act (II of 1927), section 76—Letting out by trustee of endowment of ryoti lands without fixing any period—If lease for a period exceeding five years by reason of tenant securing permanent right of occupancy in pursuance of section 6 (1) of the Madras Estates Land Act (I of 1908) requiring sanction under section 76 of Madras Act (II of 1927)—Section 3 (16) of Madras Act (I of 1908)—Waste lands covered with shrubs, jungle and like if uncultivable merely because of it or of their being not cultivated for a long time—Section 189 of Estates Land Act—Civil Court has no jurisdiction—Procedure in such cases.

Waste lands covered with shrubs, jungle and the like cannot be held to be uncultivable merely on that account or on account of their being not cultivated for a long time. Land which can be brought under cultivation is cultivable land unless some provision of law provides for holding it otherwise in certain circumstances. Such land will be "Ryoti lands" (section 3 (16) Estates Land Act) and where a person has been let into possession of such lands by a trustee, he will acquire permanent rights of occupancy under section 6 of the Estates Land Act. The order of the trustee for the grant of patta did not fix any period for which it was granted. The mere fact that section 6 of the Estates Land Act confers a permanent right of occupancy in the holding does not make the letting of the land to such a person equivalent to the grant of a lease to him for a term exceeding five years, and as such requiring the previous sanction of the Board under section 76 of the Madras Hindu Religious Endowments Act, 1927.

A suit for the recovery of rent and ejectment from the person let into possession of such lands is not cognisable by a Civil Court in view of the provisions of section 189 of the Estates Land Act. The Revenue Court alone has jurisdiction over such suit and the plaint must be returned for presentation to the proper Court.

When a Court had no jurisdiction over the subject-matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint. The Court could not deal with the cross-objection with respect of the adjustment of certain amounts paid by the tenant.

Appeal from the Judgment and Decree, dated 12th July, 1956 of the Madras High Court in A.S. No. 7 of 1954.

K. N. Rajagopal Sastri, Senior Advocate, (M. S. K. Sastri and M. S. Narasimhan, Advocates, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (T. V. R. Tatachari, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal is by certificate granted by the High Court of Madras under Article 133 (1) (a) of the Constitution.

The appellant, Sri Athmanathaswami Devasthanam, of Avidayarkoil in Tanjore District, represented by hereditary trustee Subrahmanya Pandara Sannadhi Atheena Karthar of Thiruvavaduthurai Atheenam, hereinafter called the Devasthanam, is the landholder of three villages. It sued the respondent for the recovery of a sum of Rs. 11,415-8-6 as damages for use and occupation of the lands in suit for faslis 1357 to 1360 at Rs. 3-9-0 per acre per annum. The respondent was let into possession of the land by a previous trustee of the Devasthanam in August, 1944, when he was being pressed by the State authorities for reclaiming the land and putting it to cultivation in connection with the Grow More Food Campaign launched by the Government of the country during World War II. The total land in all the three villages let out to the respondent was about 727 acres. The plaintiff contended, *inter alia*, that the lands in suit were private iruvaram lands and not ryoti lands, that the transaction by which the respondent was let into possession was not binding on the present trustee inasmuch as it had not been entered into after obtaining the permission of the Hindu Religious Endowments Board under section 76 of the Madras Hindu Religious Endowments Act (II of 1927), and that therefore the respondent was a trespasser. The respondent on the other hand, contended that the suit lands were ryoti lands, that in view of his being let into possession by the previous trustee he acquired the status of a ryot under section 3 (15) of the Madras Estates Land Act (I of 1908) and also acquired permanent rights of occupancy under section 6 of the said Act, that the transaction by which he was let into possession did not amount to an alienation and did not come within the purview of section 76 of the Endowments Act. He further contended that he was not in arrears of rent, that he had paid rents up to fasli 1356 and there was a real understanding that the realisation of rent would be waived so long as the Government waived its right to water cess and that the Government having waived water cess till the end of fasli 1360, he was not liable to pay any rent till the end of the fasli year. It was also contended that the suit lands being ryoti, and the defendant being a ryot, the suit was not maintainable in the Civil Court.

Both the trial Court and the High Court have found that the suit lands are ryoti lands. They differed about the nature of the transaction by which the respondent was let into possession. The trial Court held it to be an alienation by way of a permanent lease and so invalid in view of absence of consent of the Hindu Religious Endowments Board. The High Court, on the other hand, held that the transaction did not amount to an alienation of trust-property, that no sanction of the Board was necessary and that therefore the letting of the land to the respondent was valid. Disagreeing with the trial Court, the High Court, also found that the suit could be instituted only in the Revenue Court and that the Civil Court had no jurisdiction to entertain it. The High Court therefore set aside the decree which the trial Court had passed and ordered the return of the plaint to the plaintiff-appellant for presentation to the proper Court. The High Court further dismissed the cross-objection filed by the plaintiff-appellant with respect to the trial Court's allowing credit of a payment of Rs. 1,000 towards rent or damages due from the defendant-respondent. It is against this order that the appellant has filed the present appeal.

Learned counsel for the appellant challenged the correctness of the finding that the land in suit was ryoti land on grounds that part of the land was tank land and the rest not cultivable and therefore most of the land in suit did not come within the definition of 'ryoti land' in section 3 (16) of the Estates Land Act which reads :

" 'Ryoti land' means cultivable land in an estate other than private land but does not include—

- (a) beds and bunds of tanks and of supply drainage surplus or irrigation channels ;
- (b) threshing floor, cattle-stands, village-sites, and other lands situated in any estate which are set apart for the common use of the villagers.
- (c) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists."

It was not alleged by the appellant in its plaint or at any stage of the proceedings in the trial Court that part of the land in suit consisted of beds of tanks and therefore

did not come within the definition of ryoti land. We do not consider it fair to allow this fresh contention, relating to a question of fact to be raised at this stage, even though in some of the records of rights certain land is described as 'puramboke'.

The lands in suit, according to the plaint, was uncultivable waste lands covered with shrubs, jungle and the like. They had not been cultivated for a long time. Waste lands covered with shrubs, jungle and the like cannot be held to be uncultivable merely on that account or on account of their being not cultivated for a long time. Land which can be brought under cultivation is cultivable land unless some provision of law provides for holding it otherwise in certain circumstances. This is not disputed for the appellant, but what is urged on its behalf, is that land will not be cultivable land if it can be brought under cultivation only after incurring great expenditure. It is said that according to the respondent, about Rs. 3,00,000 were spent in reclaiming the land. Except the statement of the respondent, there is no evidence worth considering about the actual expenditure incurred by the respondent in reclaiming the land in suit which is over 700 acres in area. Reference was also made to an observation in the judgment of the High Court to the effect :

"Of course, there are some lands in an estate which are not cultivable at all, like hill tops, permanently submerged lands, etc., and they will be incapable of being claimed as ryoti lands with occupancy rights by lessees for grazing, fishing etc."

This observation seems to be a general observation and not in connection with the land in suit. The land in suit was sought to be brought under cultivation in connection with the Grow More Food Campaign and this must have been as the land in suit could be brought under cultivation without any undue expenditure of money and labour. The expenditure on reclaiming the land might have been more than the usual expenses in view of the fact that most of the labour had to be imported from outside and as tractors had to be used on account of the large size of the land to be reclaimed within as short a time as possible. It is not even shown that the reclamation of land has not been profitable financially. We are therefore of the opinion that the Courts below have rightly held the land in suit to be cultivable land.

The other point made by the appellant is against the finding that the respondent is a ryot. Ryot is defined in section 3 (15) of the Act and means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it. The contention is that the respondent alleged that no rent was payable and that in view of this assertion the respondent would not be a ryot as he holds the land without any condition of paying rent to the landholder. The contention is not factually correct. The respondent made no such definite statement in either the written statement or in his evidence which would indicate that he completely disowned his liability to pay rent. We have been referred to certain statements in the written statement. They only show that there was some dispute about the rate of rent to be paid and not about the liability to rent. In para. 4 of the written statement it was said.

"At that time the actual cash rent which was to be paid was not fixed but the defendant orally requested and was promised remission of rent as long as Government remitted water charges in this area on concessional rates of rent for some years thereafter, in view of the heavy reclamation expenses."

Again, in paragraph 7 it was said "the defendant at no time had agreed to the rate fixed by the trustee and had several times protested against it also." In paragraph 20 the defendant said,

"The allegation in paragraph 4 of the plaint that the defendant agreed to the rate of rent at Rs. 3-9-0 per acre and then entered into possession is altogether wrong. . . . Far from the defendant agreeing to the said rate, defendant both orally and in writing then and on every available opportunity thereafter has been protesting against the exorbitant rate, arbitrarily and unilaterally fixed by the trustee swayed by extraneous considerations. The defendant had also informed the trustee that if only the defendant was granted the patta which was promised to him and to which he was entitled in law, he would take the matter to the Collector for fixing a fair rent. He also took care to add that unless and until a patta was issued to him, no rent would begin to accrue."

Lastly, in paragraph 26, it was stated,

"no rent was agreed to by the defendant and the rent originally fixed by the late trustee was later abandoned by him. Hence until the rent was fixed by agreement or by the Collector, no claim for rent is sustainable."

All these statements are against the appellant's contention that the respondent asserted that he was not liable to pay rent.

In his deposition the respondent said :

"I did not agree to pay Rs. 3-9-0 per acre because I thought it was high.... In 1949 there was a demand by the temple manager for two faslis, i.e., Rs. 6,000. I told him that he should consult the Pandarasannadhi about it and that I was not going to pay anything as rent. I do not remember if I sent another letter to Pandarasannadhi about this matter. The demand sent to me by the Revenue Inspector in 1950 is Exhibit B-21. That related to rent due by me for kudikani lands in my possession I did not pay it but I entered into correspondence with the Revenue Divisional Officer. But nothing more was heard about it."

These statements too do not make out that the respondent disclaimed liability to pay rent. Whenever he refused to pay rent it was for reasons other than absence of a liability to pay rent.

There is ample material on the record to show that the respondent was liable to pay rent for the land given to him for cultivation. Exhibit A-3 is the order of the Pandarasannadhi for granting patta to the respondent of the land belonging to Avadiyarkoil Temple. The very first term mentioned in this order is that the applicant, i.e., the respondent, must pay cash rent at such rates as may be determined by the Pandarasannadhi.

We therefore do not see any force in the contention that the respondent is not a ryot as defined in the Act.

The next contention for the appellant is that the lease of the land in favour of the respondent is invalid in view of the provisions of section 76 of the Endowments Act as the Board had not sanctioned the lease. Sub-section (1) of section 76 reads :

"76. (1) No exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math of temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples."

The order for the grant of patta to the respondent did not fix any period for which it was granted. It is urged for the appellant that the lease must be taken to be for a period exceeding 5 years, as in pursuance of the provisions of section 6 (1) of the Act, the respondent secured permanent right of occupancy in his holding. Such permanent right of occupancy is not conferred on the appellant on account of the term fixed in the lease. Such right is conferred by the Act on any person who is admitted by a landholder to the possession of ryoti land. The mere admission of a ryot to the possession of ryoti land by the landholder gives that ryot the permanent right of occupancy in view of the statutory provisions of section 6. If the Pandarasannadhi had only admitted the respondent to the ryoti land for a period less than five years, even then the result would have been that the respondent would have acquired a permanent right of occupancy in this holding. We are of opinion that the mere fact that section 6 of the Act confers such a right on a person admitted to a ryoti land, does not make the letting of the land to such a person equivalent to the grant of a lease to him for a term exceeding 5 years, and as such requiring the previous sanction of the Board. If it be held otherwise the result would be that either the Pandarasannadhi will have to obtain the sanction of the Board for every proposed letting of land of whatever area, or not to exercise his ordinary duties of letting the land as a trustee. The provisions of section 76 could not have been intended to put such a restriction on the exercise of his ordinary rights by the Pandarasannadhi. It is too much to expect that the combined effect of section 76 of the Endowments Act and section 6 of the Estates Land Act is that there be no more letting of land belonging to a temple by the Pandarasannadhi. We hold that the letting of the land to the respondent did not amount to the leasing of the land to him for a term exceeding 5 years and that therefore required no sanction of the Board and that the letting of the land to the respondent is valid and good in law.

The respondent being a ryot, a suit for the recovery of rent and ejectment is not cognizable by a Civil Court, in view of the provisions of section 189 of the Act. Sub-section (1) of section 189 reads :

"189. (1) A District Collector or Collector hearing suits or applications of the nature specified in Parts A and B of the Schedule and the Board of Revenue or the District Collector exercising appellate or revisional jurisdiction therefrom shall hear and determine such suits or applications or exercise such jurisdiction as a Revenue Court.

No Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made."

Suits by a landholder to recover arrears of rent and to eject a ryot are triable by a Collector, vide entries at serial Nos. 3 and 11, Part A of the Schedule to the Act. Such suits cannot be taken cognizance of by a Civil Court in view of second paragraph of section 189 (1). The High Court is right in holding that the Revenue Court alone has the jurisdiction over the suit and therefore in ordering the return of the plaint for presentation to the proper Court.

The last point urged is that when the civil Court had no jurisdiction over the suit, the High Court could not have dealt with the cross-objection filed by the appellant with respect to the adjustment of certain amount paid by the respondent. This contention is correct. When the Court had no jurisdiction over the subject-matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint.

We therefore dismiss the appeal except in so far as it relates to the order of the High Court on the cross-objection filed by the appellant. We set aside the order dismissing the cross-objection. We order the appellants to pay the costs of the respondent throughout.

K.S.

*Appeal dismissed
in the main.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Chaliagulla Ramachandrayya and others

.. Appellants*

v.

Boppana Satyanarayana and others

.. Respondents.

Transfer of Property Act (IV of 1882), section 53-A—Applicability—C bringing in N into his family under an arrangement that latter would marry his wife's sister's daughter and help him in cultivation and management of the properties in consideration of which N would inherit the entire property after C's death—Alienees from Reversioners of C suing for recovery of property in the hands of N's sons—N's sons if can rely on equitable doctrine of part performance and resist the claim.

C had brought in N into his family, under an arrangement that N would marry C's wife's sister's daughter and help him in cultivation and management of the properties in consideration of which N would inherit the entire property after C's death. A suit by the alienees from the reversioners of C was resisted by the son's of N who were then in possession of the properties. It was contended that the contract itself between C and N would have the effect of transferring interest in the property to N on C's death.

Held, After section 53-A of the Transfer of Property Act was enacted the only case in which the English doctrine of equity of part performance can be applied in India is where the requirements of section 53-A are satisfied. Quite clearly section 53-A does not apply to the facts of the present case. Considerations of equity cannot confer on N or his heirs any title in the lands which under the statute could be conferred only by a registered instrument.

Appeal from the Judgment and Decree, dated 29th March, 1956 of the Andhra Pradesh High Court in Appeal Suit No. 182 of 1950.

B. Manavala Chowdhry and B. K. B. Naidu, Advocates, for Appellants.

Narasiah Chowdhry and *R. Gopalakrishnan*, Advocates, for Respondents Nos. 1, 2 and 8.

The Judgment of the Court was delivered by

Das Gupta, J.—This appeal brought on a certificate granted by the High Court of Andhra Pradesh is against a decision of that Court reversing a decree granted by the Subordinate Judge, Masulipatnam, dismissing a suit for partition.

Of the three plaintiffs who brought the suit, two claimed to be the reversioners of Boppanna Chandrappa, to whom we shall refer to as Chandrappa, and the third a purchaser of the interest of some of the reversioners, *viz.*, defendants 4, 5, and 7. According to the plaint the three plaintiffs were thus entitled to a 5/6th share of the properties while the 6th defendant was entitled as a reversioner of Chandrappa to the remaining 1/6th share. The property was however in the actual possession of the three sons of Nagayya who were impleaded as the first three defendants.

In contesting the suit these defendants denied that these properties had ever belonged to Chandrappa and further that the plaintiffs 1 and 2 or the defendants 4, 5, 6 and 7 were his reversioners. The main defence however was that even if the properties did belong to Chandrappa, the defendant's father Nagayya became entitled to these as Chandrappa's illatom son-in-law. The basis of this plea of illatom son-in-lawship was said to be that Chandrappa had brought Nagayya into his family under an arrangement that the latter would marry his wife's sister's daughter Mangamma and help him in cultivation and management of the properties, in consideration of which Nagayya would inherit the entire property after Chandrappa's death.

The trial Court held that all the suit properties except a small portion did belong to Chandrappa and the plaintiffs would be entitled to 5/6th share of Chandrappa's properties and the 6th defendant to the remaining 1/6th share, on the death of Chandrappa's widow Ramamma. He however accepted the defence case that Nagayya had become entitled to the property on Chandrappa's death as Chandrappa's illatom son-in-law and accordingly dismissed the suit.

On appeal, the High Court held that the custom by which an illatom son-in-law inherited property could not be extended to a case where the marriage took place not with the daughter of the owner of the property but with some other relation of his. The High Court also rejected an alternative plea that appears to have been raised before it that Nagayya became entitled to the property on the basis of a contract between him and Chandrappa. In this view of the law, the High Court set aside the order passed by the Trial Court and decreed the suit.

It is no longer disputed before us that the rights of an illatom son-in-law cannot be claimed by a person who under a promise from the owner of the property that he would inherit the property marries not the daughter but some other relation of the owner of the property. The alternative contention which was raised before the High Court has however been repeated before us. It has been urged that there was a good and valid contract between Chandrappa and Nagayya, that in consideration of Nagayya marrying Mangamma and looking after Chandrappa's property, Chandrappa would make him his heir and that the consequence of this contract was that Nagayya became Chandrappa's heir. The question here is not whether on Chandrappa's death Nagayya could have obtained specific performance of the alleged contract. For, assuming that there was a contract as alleged and that it was a valid contract, enforceable at law and also such of which specific performance could have been obtained by proper proceedings in Courts, the appellants' rights would be to seek such specific performance. The contention on behalf of the appellant is that even though specific performance has not been sought or given the contract itself would have the effect of transferring interest in the property to Nagayya on Chandrappa's death.

In support of this contention the learned Counsel relied on three decisions of High Courts in India and also a decision of the Privy Council. The first decision in point of time is the case of *Challa Papi Reddi and another v. Challa Koti Reddi*¹. The facts there were that the defendant's father who was selected by Musalireddi, in pursuance of a special custom, as a son-in-law who should take his property as if he was a son entered into possession of the property on Musalireddi's death. He then associated with himself the plaintiff in the management of his property on promise of a share. The plaintiff continued thus for many years, aiding in the management and improvement of the property, until a short time before the suit was brought, the first defendant turned the plaintiff out of doors and refused to give him the promised share. The High Court of Madras held that the agreement by the first defendant's father was to the effect that the plaintiff was being admitted to the rights of a co-sharer and further, as there was a complete adoption or ratification of the father's contract by the first defendant he ought to be held to it and the plaintiff was therefore a co-sharer in the property.

It has to be mentioned that this case was decided long before the Transfer of Property Act, 1882 was enacted and the question whether a written document was necessary for transfer did not come up for consideration.

In *Bhala Nahana v. Prabhu Hari*², which was the next case cited, what happened was that one Gosai Ramji induced the parents of the defendant Prabhu Hari to give him in adoption by an express promise to settle his property upon the boy but died before such settlement could be executed. Nearly 30 years after his death Ramji's widow Bhani gave effect to her husband's undertaking by executing a deed of gift of his property in her hands in favour of Prabhu Hari. The reversioner to Gosai Ramji's estate contested in a suit brought by him, the validity of this alienation. In holding that the alienation was valid, the High Court of Bombay pointed out that the performance of a husband's contracts was among the proper and necessary purposes specified by Hindu jurists under which a widow could alienate property and said further that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contracts survived and the property in the hands of his widow was bound by that contract. Whether Prabhu Hari would have been entitled to the property even in the absence of the deed of gift did not fall for consideration in that case.

It also deserves to be mentioned that this case was also decided several years before the Transfer of Property Act came into force.

In *Asita Mohan Ghosh Moulik v. Mohon Ghosh Moulik*³, one of the questions in dispute was whether the adopted son could take an equal share with the son. Answering the question in the affirmative, the High Court of Calcutta after deciding that under the Hindu Law the adopted son was entitled to an equal share, also referred to an *Ikrarnama* which had been executed by the adoptive father, and holding that the *Ikrarnama* was valid and operative, said that even apart from the law, the adopted son would be so entitled. It is difficult to see how this can be of any assistance in solving our present problem.

Lastly, the learned Counsel relied on the decision of the Privy Council in *Venkayamma Rao v. Appa Rao*⁴. The main question in controversy in that case was whether there was a completed contract by which the Rani, the former owner of the property had agreed that the possession of the property would be given to her niece Venkayamma Rao immediately upon the expiry of her life interest. The Privy Council held that there was such completed contract and directed the Receiver to deliver possession "upon the terms of the contract now affirmed."

It may be mentioned that this decision in *Venkayamma Rao's case*⁴ was among the authorities on which the Calcutta High Court relied in *Ariff v. Jadunath*⁵. The

1. 7 Mad. H.C.R. 25.

2. I.L.R. 2 Bom. 67.

3. 20 C.W.N. 901.

4. (1916) I.L.R. 39 Mad. 509; 31 M.L.J. 138:

L.R. 43 I.A. 138.

5. L.R. 58 I.A. 91; I.L.R. 58 Cal. 1235; 60 M.L.J. 538.

High Court held that the result of equitable principles which had been applied in many cases in England and were also applied by the Privy Council in *Venkayamma Rao's case*¹ was that the defendant had acquired the rights of a permanent tenant. When this very case went up to the Privy Council in appeal², the High Court's decision was reversed. The Privy Council pointed out that the dicta in *Venkayamma Rao's case*¹ did not mean :

"That equity can override the provisions of a statute and (where no registered document exists and no registerable document can be procured), confer upon a person a right which the statute enacts, shall be conferred only by a registered instrument."

This decision of the Privy Council in *Arif v. Jadunath*³, was given in January, 1931. Nearly two years before that section 53-A had been enacted in the Transfer of Property Act introducing in a limited form the doctrine of equity of part performance. There can, in our opinion, be no doubt that after section 53-A was enacted the only case in which the English doctrine of equity of part performance could be applied in India is where the requirements of section 53-A are satisfied. Quite clearly, section 53-A does not apply to the facts of the present case. It must therefore be held that the considerations of equity cannot confer on Nagayya or his heirs any title in the lands which under the statute could be conferred only by a registered instrument.

Our conclusion therefore is that the High Court was right in holding that Nagayya or his heirs had acquired no right in the property. The appeal is accordingly dismissed. In the circumstances of the case, we make no order as to costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, A.K. SARKAR AND K.N. WANCHOO, JJ.

Jardine Henderson Limited

Appellant*

v.

The Workmen and another

Respondents.

Industrial Dispute—Bonus—Interest on paid up capital—Not linked up with the dividends that may be declared—Six per cent to be allowed—Closing bonus—Not a customary bonus connected with festivals—Closing bonus—Not uniformly paid—Paid on the basis of trading results—Is in the nature of profit bonus only—Not on implied condition of service.

The Tribunal was wrong in allowing only 2½ per centum interest on paid-up capital on the ground that the actual dividend declared by the appellant was only 2½ per centum for that year. The return on paid up capital provided in the Full-Bench formula is not linked with actual dividends that might be declared by a company. Many a time companies declare dividends higher than six per centum. But under the formula they are usually allowed six per centum interest on paid up capital irrespective of the dividends declared. It is only where a company can make out an exceptional case for allowing more than six per centum interest on paid up capital that the tribunal can award more. Similarly it is only when an exceptional case is made out for allowing less than six per centum interest that the tribunal would be justified in allowing less. The fact that a company declares dividend at more or less than six per centum is no reason for changing the rate of interest allowed under the Full Bench formula on paid-up capital. Where no reason had been shown besides the fact that the dividend declared was less than six per centum to reduce the usual rate of interest from six per centum to 2½ per centum, the tribunal should have allowed six per centum interest on paid up capital. If six per centum interest is allowed on paid up capital in this case there will be no justification for allowing more as profit bonus than what the management has already given.

That customary bonus of the nature dealt with in *Graham Trading Co., Ltd. v. Its workmen*, (1960) 1 S.C.R. 107 : (1961) 1 S.C.J. 246, is always connected with some festival. The closing bonus is not connected with any festival and therefore cannot be treated as customary bonus.

The fact that bonus was paid during a year of loss also would be an important circumstance in coming to the conclusion that payment was a matter of obligation based on an implied agreement. The absence of this important circumstance along with the fact that the bonus was paid only after the trading results of the year were known and therefore in all probability depended upon the profits would show that it could not be a matter of obligation based upon implied agreement.

1. (1916) 31 M.L.J. 138; L.R. 43 I.A. 138;
I.L.R. 39 Mad. 509.

*C.A. No. 359 of 1961.

2. L.R. 58 I.A. 91; 58 Cal. 1235 : 60
M.L.J. 538.

5th March, 1962.

The closing bonus has not been paid from the beginning when the Management took over the business of the previous company, though it was paid at a uniform rate from 1948 to 1957. Taking therefore all the circumstances into account it appears that closing bonus has been paid on the basis of the trading results of the previous year and depended upon the profits earned in the previous year. the circumstances it cannot be held that one month's pay as closing bonus is payable as an implied In condition of service irrespective of the profits made by the Management. It is in the nature of profit bonus, even though it may have been paid at a uniform rate for ten years.

Appeal by Special Leave from the Award dated the 18th April, 1960, of the Third Industrial Tribunal, West Bengal, in case No. VIII-153 of 1959.

B. Sen, Senior Advocate (*Sukumar Ghose* and *B. N. Ghosh*, Advocates with him), for Appellant.

D.N. Mukherjee, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal by Special Leave arises out of a question of bonus referred by the Government of West Bengal to the Third Industrial Tribunal. The appellant is a company carrying on business in Calcutta and the dispute relates to closing bonus for the year 1958. It appears that the appellant had been paying a bonus which was called closing bonus, to its workmen at the rate of one month's pay from 1948 to 1957. In 1958, however, as the profits of the appellant fell considerably, the quantum of closing bonus was reduced to half a month's pay. In consequence a dispute was raised by the respondents-workmen represented by two unions and their claim was that they should have been paid one month's bonus as usual. Consequently Reference was made to the tribunal and the question for decision was whether the management was justified in reducing the quantum of closing bonus to half a month's pay in 1958.

The case of the workmen was that the appellant had been paying two kinds of bonuses to its workmen each year, namely, (i) Puja bonus which was paid usually before the Puja festival, and (ii) closing bonus which was paid after the close of the financial year ending on 31st March, each year. The workmen claimed that closing bonus had been paid at a uniform rate from 1948 to 1957 and this payment had therefore become an implied condition of service between the workmen and the appellant; in the alternative the claim was that the payment had acquired the character of customary bonus and was not dependent upon profits earned by the appellant.

On the other hand the contention of the appellant was that the payment of closing bonus at a uniform rate of one month's pay for ten years previous to 1958 had not in fact turned the payment into an implied condition of service as this bonus was of the nature of profit bonus and its payment depended upon the profits made by the appellant. It was urged further that the very fact that this bonus was paid after the accounts for the year were made up and the profits ascertained showed that it was a bonus depending upon profits; the circumstance that it was paid at a uniform rate for sometime was only fortuitous, particularly as the appellant had increased the Puja bonus as its profits increased in order to help the workmen at festival time. As to the alternative case of customary bonus, the appellant contended that this bonus had no connection with any festival and was paid after the state of profits earned by the appellant was known and therefore could not be demanded as a customary bonus. Finally, the appellant pleaded that if closing bonus was treated as profit bonus there was no available surplus to justify the grant of any further amount as bonus besides half a month's pay which the appellant had already given to the workmen.

The tribunal came to the conclusion that it had not been proved that the payment of closing bonus had become an implied condition of service and in that connection relied on the decision of this Court in *Messrs. Ispahani Limited, Calcutta v. Ispahani Employees' Union*¹. Further it held that the bonus could not be held to

be a customary bonus as there was nothing to show that it had been paid even in a year of loss. It therefore negatived the case of the workmen that closing bonus of one month's pay was payable every year after the accounts were closed either as an implied condition of service or as a customary bonus. The tribunal then went into the question whether any further amount besides half a month's pay which had already been paid by the appellant as bonus could be awarded as profit bonus on the basis of the Full Bench formula approved by this Court in *The Associated Cement Companies Limited v. Its workmen*¹. It held that there was sufficient available surplus to warrant payment of one month's pay as profit bonus and therefore ordered that half a month's basic salary be further paid as profit bonus to the workmen for the year in dispute. It is this decision of the tribunal which has been assailed before us by the appellant.

So far as profit bonus is concerned, the main contention on behalf of the appellant is that the tribunal went wrong in allowing $2\frac{1}{2}$ per centum interest on paid-up capital and that it should have allowed 6 per centum interest, which is the usual amount allowed under the Full Bench formula. The reason why the tribunal allowed $2\frac{1}{2}$ per centum interest was that the appellant had paid dividend at $2\frac{1}{2}$ per centum in that year as its profits had shown a considerable fall. We are of opinion that the tribunal was wrong in allowing only $2\frac{1}{2}$ per centum interest on paid-up capital on the ground that the actual dividend declared by the appellant was only $2\frac{1}{2}$ per centum for that year. The return on paid-up capital provided in the Full Bench formula is not linked with actual dividends that might be declared by a company. Many a time companies declare dividends higher than six per centum. But under the formula they are usually allowed 6 per centum interest on paid-up capital irrespective of the dividends declared. It is only where a company can make out an exceptional case for allowing more than 6 per centum interest on paid-up capital that the tribunal can award more. Similarly it is only when an exceptional case is made out for allowing less than 6 per centum interest that the tribunal would be justified in allowing less. We are of opinion that the fact that a company declares dividend at more or less than 6 per centum is no reason for changing the rate of interest allowed under the Full Bench formula on paid-up capital. In the present case no reason has been shown besides the fact that the dividend declared was less than 6 per centum to reduce the usual rate of interest from 6 per centum to $2\frac{1}{2}$ per centum. We are therefore of opinion that the tribunal should have allowed 6 per centum interest on paid-up capital in this case and that would increase the amount due under this head from Rs. 5 lacs to Rs. 12 lacs. It is not disputed by learned counsel for the respondents that if 6 per centum interest is allowed on paid-up capital in this case as is usually done there will be no justification for allowing more as profit bonus than what the appellant has already given. In the result the tribunal's award of half a month's further wages as bonus on the ground that there is available surplus to justify it must be set aside.

Learned counsel for the respondents however submitted that even though no further bonus could be allowed on the basis of the Full Bench formula, the workmen were entitled to one month's pay as closing bonus either as an implied condition of service or as a customary bonus. So far as customary bonus is concerned, it is enough to say that customary bonus of the nature dealt with in *Graham Trading Co., Ltd. v. Its workmen*², is always connected with some festival. In the present case it is not in dispute that the closing bonus is not connected with any festival and therefore cannot be treated as customary bonus of the kind dealt with in *Graham's case*². This was pointed out by this Court in *B.N. Elias & Co., Ltd. Employees' Union v. B.N. Elias & Co. Ltd.*³, where it was observed that it was difficult to introduce the payment of customary bonus between employer and employee where terms of service are governed by contract, express or implied, except where the bonus may

1. (1959) S.C.R. 925.

2. (1960) 1 S.C.R. 107.

3. (1960) S.C.J. 1233 : (1960) 3 S.C.R. 382.

be connected with a festival, whether 'Puja' in Bengal or some other equally important festival in any other part of the country. Therefore as closing bonus is admittedly not connected with any festival it cannot be allowed as a customary bonus of the type considered in *Graham's case*¹.

Turning now to the question whether payment of one month's pay as closing bonus has become an implied condition of service, the first point to be noticed is that closing bonus was always paid after the trading results of the year were known. Under these circumstances it would not be improper to infer that closing bonus was dependent upon profits made by the appellant, for it was paid only after profits for the previous year had been ascertained. In the present case during the whole of the period from 1948 to 1957 when the closing bonus was paid there was no loss incurred by the appellant. As was pointed out in *Ispahani's case*² the fact that bonus was paid during a year of loss also would be an important circumstance in coming to the conclusion that payment was a matter of obligation based on an implied agreement. In the present case that important circumstance is absent. The absence of this circumstance along with the fact that the bonus was paid only after the trading results of the year were known and therefore in all probability depended upon the profits would show that it could not be a matter of obligation based upon implied agreement.

Besides it appears that this company formerly belonged to another owner and merged with the appellant in 1946. When the former company was the owner it does not appear that it paid any closing bonus as such from 1940 to 1945. Even after the appellant took over no payment was made in 1946 and 1947. It was only from 1948 after the trading results for the year ending on 31st March, 1948, were known that one month's basic wages began to be paid as closing bonus in addition to Puja bonus which was originally paid at the rate of one month's basic wages but which was gradually increased to two months' basic wages from 1955. For the year in dispute the appellant has paid two months' puja bonus; but it reduced the closing bonus from one month to half a month's basic wages because of the fall in profits which fell from Rs. 27 lacs in 1957 to a little over Rs. 15 lacs in 1958. It is clear therefore that the closing bonus has not been paid from the beginning when the appellant took over the business of the previous company, though it was paid at a uniform rate from 1948 to 1957. It may be mentioned that in 1959 when profits went up again the appellant has paid one month's pay as closing bonus. Taking therefore all the circumstances into account it appears that closing bonus has been paid on the basis of the trading results of the previous year and depended upon the profits earned in the previous year. In the circumstances it cannot be held that one month's pay as closing bonus is payable as an implied condition of service irrespective of the profit made by the appellant. It seems to have been of the nature of profit bonus, even though it may have been paid at a uniform rate for ten years.

We therefore allow the appeal, set aside the order of the tribunal and reject the claim of the workmen for any closing bonus over and above that paid by the appellant for the year 1958. In the circumstances we order the parties to bear their own costs.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S.J. IMAM, N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAH, JJ.
Chandrika Sao and Hazari Lal .. Appellants*

The State of Bihar

.. Respondents.

Penal Code (Act XLV of 1860), sections 349, 350 and 353—Criminal force to deter public servant from discharging his duty—Sales Tax Officer—Surprise visit to shop of dealer and perusing account books of dealer—Act of snatching away the books from the hands of Officer—Offence committed—Act also an offence under section 26 (1) (h) of Bihar Sales Tax Act (XIX of 1947)—Prosecution launched for graver offence under the Penal Code and not under section 26 (1) (h) of the Sales Tax Act—Not an unwarranted procedure.

It would be clear from a bare perusal of section 349 of the Penal Code that one person can be said to have used force against another, if he causes motion, change of motion or cessation of motion to that other. By snatching away the books which the officer was holding the accused necessarily caused a jerk to the hand or hands in which the officer was holding the books. His act, therefore, may be said to have caused motion to the officer's hand or hands. Further, the natural effect of snatching the books from the hand or hands of the officer would be to affect his sense of feeling of the hand or hands. The action of the accused amounts to use of force as contemplated by section 349, Indian Penal Code.

Mere use of force, however is not enough to bring an act within the terms of section 353, Indian Penal Code. It has further to be shown that force was used intentionally to any person without that person's consent in order to commit an offence or with the intention or with the knowledge that the use of force will cause injury, fear or annoyance to the person against whom the force is used. The accused did cause annoyance to the officer by snatching away the books from his hands and the action of the accused amounts to an offence.

In view of the fact that the law confers a power upon the Sales Tax Authorities to inspect account books of a dealer and for that purpose even pay surprise visits to the shop of the dealer it would follow that there is an obligation on the dealer to allow the authorities to inspect his books of account. No permission from him, express or tacit for that purpose is necessary. The Officer was, therefore, lawfully in possession of the account books when he took them up in the shop and started perusing them.

The accused had no justification in law to snatch the books of accounts from him. To feel annoyed at this action of the accused would be the natural reaction of the Officer and, therefore, the act of the accused must be held to amount to use of criminal force. The act in snatching away the books amounts to obstruction of an officer making an inspection, which act is made punishable by section 26 (1) (h) of the Bihar Sales Tax Act, (XIX of 1947).

Merely holding books found lying in the premises for perusing them cannot properly be regarded as seizure because seizure implies doing something over and above holding an article in one's hand. According to the Shorter Oxford Dictionary, seizure among other things, means "..... confiscation for forcible taking possession (land or goods) a sudden and forcible taking hold". As already stated, the Officer merely picked up the books which were lying in the shop and did not snatch them away from anyone nor did he take them by force. On the contrary they were taken away by force by the accused.

Whether the Officer was obstructed while making an inspection of the account books or while he was intending to seize them, the Commissioner's sanction would certainly have been required under sub-section (2) of section 26 of Bihar Act XIX of 1947 if in fact the accused was prosecuted specifically for obstructing the Officer. He could have been prosecuted for these offences even without proof of the fact that he had used criminal force. It would no doubt appear that the accused has committed an offence under section 26 (1) (h) of the Sales Tax Act as also under section 353, Indian Penal Code, because he has used criminal force. He could be prosecuted for either or both these offences at the discretion of the prosecution. It may be that he was not prosecuted in respect of both the offences and the prosecution was restricted to the offence under section 353, Indian Penal Code, only to obviate the necessity of obtaining the Commissioner's sanction. Even so, the prosecution cannot be said to have done something which is unwarranted by law. An offence under section 353, Indian Penal Code, is a graver offence than the one under section 26 (1) (h) of the Bihar Sales Tax Act because it is punishable with imprisonment for a period upto two years or to payment of fine without any limit, or both, whereas an offence under section 26 (1) (h) is punishable with imprisonment which may extend upto six months or with a fine not exceeding Rs. 1,000 or both. In choosing to prosecute the accused for a graver offence under the general law the prosecution cannot be regarded as having acted colourably.

Section 26 (1) (h) of the Bihar Sales Tax Act deals only with one kind of obstruction and no more. But there may be an obstruction which may involve graver consequences to the Officer obstructed such as grievous hurt or even death. It would lead to startling results if it were to be held that the prosecution acted colourably in not restricting the accusation to a minor offence requiring sanction. For, if the prosecution were to be so restricted, grave offences will go unpunished. Surely, that is not what the Legislature could ever have intended when it enacted section 26 of the Act. It makes little difference if the prosecution decided to proceed with respect to a graver offence and ignore one which is of a comparatively minor character.

Appeals by Special Leave from the Judgments and Orders dated the 1st November and 19th September, 1960, of the Patna High Court in Criminal Revisions Nos. 812 of 1960 and 76 of 1959 respectively.

Sarjoo Prasad, Senior Advocate, (*K. Sinha*, Advocate, with him), for Appellant (In both the Appeals).

S.P. Varma, Advocate, for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave from the judgment of the High Court of Patna upholding the appellant's conviction under section 353, Indian Penal Code, and the sentence passed against him.

The facts which are not in dispute are as follows :

On the evening of 29th October, 1957, Mr. Bhupendra Narain Singh, Assistant Superintendent of Commercial Taxes, Patna Sadar circle, paid a surprise visit to the shop of Hazari Lal & Co., in Barah town in order to inspect the books of accounts maintained by the shop. At that time the appellant Hazari Lal was in the shop. Mr. Singh found that two sets of account books were kept in the shop. He took them up and started looking into them. The appellant snatched away both the books from him, passed them on to one of his servants who made them over to another servant who was on the upper floor. Mr. Singh directed his orderly peon to recover the books. The peon was, however, prevented by the appellant from going to the place where the account books had been taken and in the scuffle which ensued between the two, the orderly's shirt was torn. Thereafter Mr. Singh went to the Police Station to lodge a complaint. The appellant who was brought there by the Sub-Inspector, tendered an apology in writing and so Mr. Singh did not lodge a complaint. He, however, submitted a report in writing to the Superintendent of Commercial Taxes. The Superintendent thereupon reported the incident to the Deputy Superintendent of Police and eventually lodged a First Information Report on 1st November.

It is urged before us by Mr. Sarjoo Prasad, who appears for the appellant, that mere snatching away of books does not amount to using force as contemplated by section 349, Indian Penal Code, and at any rate it does not amount to use of criminal force as contemplated by section 350, Indian Penal Code. If, therefore, the act of the appellant did not constitute the use of criminal force, his conviction under section 353, Indian Penal Code, cannot be sustained. His contention is that no force was used against the person of Mr. Singh and, therefore, the requirements, of section 349, Indian Penal Code, were not satisfied. Section 349, Indian Penal Code, reads thus :

"Force.—A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling :

Provided that the person causing the motion, or change of motion or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion, or to cease to move."

It would be clear from a bare perusal of the section that one person can be said to have used force against another if he causes motion, change of motion or cessation of motion to that other. By snatching away the books which Mr. Singh was holding the appellant necessarily caused a jerk to the hand or hands of Mr. Singh in which he was holding the books. His act, therefore, may be said to have caused motion to Mr. Singh's hand or hands. Further, the natural effect of snatching

the books from the hand or hands of Mr. Singh would be to affect the sense of feeling of the hand or hands of Mr. Singh. We have, therefore, no doubt that the action of the appellant amounts to use of force as contemplated by section 349, Indian Penal Code.

Mere use of force, however, is not enough to bring an act within the terms of section 353, Indian Penal Code. It has further to be shown that force was used intentionally to any person without that person's consent in order to commit an offence or with the intention or with the knowledge that the use of force will cause injury, fear or annoyance to the person against whom the force is used. The contention of Mr. Sarjoo Prasad is that the appellant did not intend to commit any offence but only wanted to retrieve his own property of which Mr. Singh had taken possession without his permission. He also contended that the appellant's act has admittedly caused no injury or fear to Mr. Singh nor can it be said to have caused any justifiable annoyance to him. We cannot accept Mr. Sarjoo Prasad's contention that the appellant did not cause annoyance to Mr. Singh by snatching away the books from his hands nor do we accept his contention that the action of the appellant does not amount to an offence.

The contention of Mr. Sarjoo Prasad that Mr. Singh could not inspect the account books without the permission of the appellant ignores the provisions of section 17 of the Bihar Sales Tax Act, 1947 (Bihar Act XIX of 1947) and rule 50 of the Rules framed under the Act. Sub-section (2) of section 17 of the Act provides that all accounts, registers and documents relating to stocks of goods or purchases, sales and deliveries of goods by any dealer and all goods kept in any place of business of any dealer shall at all reasonable times be open to inspection by the Commissioner. It is common ground that the Commissioner is authorised by law to delegate his power to his subordinates and it is not disputed that such power has been delegated to the Assistant Superintendent of Commercial Taxes. Sub-section (4) of section 17 further empowers the Commissioner to enter and search any place of business of any dealer. Under his delegated power the Assistant Superintendent of Commercial Taxes, therefore, has the right to enter a place of business. Rule 50 deals with inspections. That rule empowers the Commissioner in his discretion to pay a surprise visit to the business premises of a dealer for inspection of the accounts, registers, documents, stocks and goods of such dealer though the normal procedure is that he should give reasonable notice in writing to the dealer of his intention to make an inspection. Therefore, though Mr. Singh had not given any notice of his intention to visit the shop of the appellant, he was entitled to pay a surprise visit. Mr. Singh paid such a surprise visit evidently because he suspected that the appellant was maintaining a double set of account books. In view of the fact that the law confers a power upon the Sales Tax Authorities to inspect account books of a dealer and for that purpose even pay surprise visits to the shop of the dealer it would follow that there is an obligation on the dealer to allow the Authorities to inspect his books of account. No permission from him, express or tacit, for that purpose is necessary. Mr. Singh was, therefore, lawfully in possession of the account books when he took them up in the shop and started perusing them. The appellant had no justification in law to snatch the books of accounts from him. To feel annoyed at this action of the appellant would be the natural reaction of Mr. Singh and, therefore, the appellant's act must be held to amount to use of criminal force. We are further clear that the appellant's act in snatching away the books amounts to obstruction of an officer making an inspection, which act is made punishable by section 26 (1) (h) of the Act.

Mr. Sarjoo Prasad then referred to the prosecution allegation that Mr. Singh, after being deprived of the possession of account books, directed his peon to retrieve them and said that the real object of Mr. Singh was to seize the account books under section 17. He added that this is made further clear from the following passage in the report made by Mr. Singh to his superior.

"From the statement given above, it is clear that Sri Hazari Lal, proprietor of M/s. Hazari Lal & Co., has deliberately obstructed me from seizing the double sets of accounts which were found in his business premises. He had further assaulted my peon in his business premises besides snatching away the double sets of accounts as referred above. He has thereby committed offence punishable under law."

His first contention is that Mr. Singh had in fact seized the account books or had picked them with the object of seizing and as he had not complied with the requirement of sub-section (3) of section 17, that is, of recording his reasons in writing for making a seizure of the books, his act was illegal and the appellant was justified in resisting the seizure. In support of his contention he relied on the unreported decision of Patna High Court in *Prahlad Ram v. State*¹. In that case account books had been seized by a Superintendent of Commercial Taxes from the premises of a dealer for the purpose of inspecting them and it was held that the seizure was illegal because he had not recorded in writing his reasons for making the seizure as required by sub-section (3) of section 17 of the Act. The dealer and some of his employees were convicted of an offence under section 353, Indian Penal Code. The High Court acquitted them on the ground that they were entitled to use force as the search of the premises and the seizure of the books was illegal. That case is distinguishable from the present one. Mr. Sarjoo Prasad, however, contends that here also Mr. Singh had taken possession of the account books and he must be deemed to have seized them. In our opinion merely holding books found lying in the premises for perusing them cannot properly be regarded as seizure because seizure implies doing something over and above holding an article in one's hand. According to the Shorter Oxford Dictionary, seizure, among other things, means ".....confiscation or forcible taking possession (land or goods); a sudden and forcible taking hold." As already stated, Mr. Singh merely picked up the books which were lying in the shop and did not snatch them away from anyone not did he take them by force. On the contrary they were taken away by force by the appellant. If, indeed, he had retrieved them by force it may have been possible to urge that that latter act of his amounts to seizure. The case, therefore, does not help learned counsel.

He next contended that the only offence which the appellant has committed was one under section 26 (1) (h) of the Act and that as no previous sanction of the Commissioner had been obtained for launching the prosecution the trying Magistrate was precluded by the provisions of sub-section (2) of section 26 from taking cognizance of the alleged offence. Undoubtedly had the appellant been prosecuted for obstructing Mr. Singh from inspecting or seizing the account books, the trying Magistrate would have been incompetent to take cognizance of the offence without the previous sanction of the Commissioner. The appellant is, however, not being proceeded against for that offence but only for the offence under section 353, Indian Penal Code, for which no sanction is required. Learned counsel contends that the whole object of the prosecution is to get round the provisions of sub-section (2) of section 26 and that that is why the prosecution was launched under section 353, Indian Penal Code. The suggestion apparently is that the prosecution of the appellant for the offence under section 353 is merely colourable. Whether Mr. Singh was obstructed while making an inspection of the account books or while he was intending to seize them, the Commissioner's sanction would certainly have been required under sub-section (2) if in fact the appellant was prosecuted specifically for obstructing Mr. Singh. He could have been prosecuted for these offences even without proof of the fact that he had used criminal force. From the facts found it would no doubt appear that the appellant has committed an offence under section 26 (1) (h) of the Act as also under section 353, Indian Penal Code, because he has used criminal force. He could be prosecuted for either or both these offences at the discretion of the prosecution. It may be that he was not prosecuted in respect of both the offences and the prosecution was restricted to the offence under section 353, Indian Penal Code, only to obviate the necessity of obtaining the Com-

missioner's sanction. Even so, the prosecution cannot be said to have done something which is unwarranted by law. An offence under section 353, Indian Penal Code, is a graver offence than the one under section 26 (1) (h) of the Act because it is punishable with imprisonment for a period upto two years or to payment of fine without any limit, or both, whereas an offence under section 26 (1) (h) is punishable with imprisonment which may extend upto six months or with a fine not exceeding Rs 1,000 or both. In choosing to prosecute the appellant for a graver offence under the general law the prosecution cannot be regarded as having acted colourably.

Section 26 (1) (h) of the Act deals only with one kind of obstruction and no more. But there may be an obstruction which may involve graver consequences to the officer obstructed such as grievous hurt or even death. It would lead to startling results if it were to be held that the prosecution acted colourably in not restricting the accusation to a minor offence requiring sanction. For, if the prosecution were to be so restricted, grave offences will go unpunished. Surely, that is not what the Legislature could ever have intended when it enacted section 26 of the Act. It makes little difference if the prosecution decided to proceed with respect to a graver offence and ignore one which is of a comparatively minor character.

Mr. Sarjoo Prasad relied upon an unreported decision of the Patna High Court in support of his aforesaid contention. That is the decision in *Sonlal Seth v. The State*¹. There the question which arose for consideration was whether an act of the kind proved in the case before us falls under section 353, Indian Penal Code. Das J., who decided the case held that it does not. The reason given by him is that the definition of criminal force contained in section 353, Indian Penal Code, shows that what is contemplated by the section is the use of criminal force to or against a person and not to an inanimate object. He then observed :

"It is true that in certain circumstances criminal force used to an inanimate object may result in the use of criminal force to a person also ; that is made clear by *Illustrations (a) and (b)* to section 350, Indian Penal Code. In the particular case before me no force appears to have been used to the Inspector of Sales Tax at all. I doubt whether in the circumstances of this case it can be said that criminal force was used to the Inspector of Sales Tax. In my opinion, it would be over-taxing ingenuity to bring the act of the petitioner within the mischief of criminal force, as defined in section 350 of the Indian Penal Code."

The learned Judge went on to observe that a more straightforward course would have been to prosecute the accused under section 26 of the Sales Tax Act. With respect, we may point out that the learned Judge has omitted to consider the words "change of motion or cessation of motion to that other". Had the learned Judge borne these ingredients in mind he would no doubt have considered the effect of snatching away the books from the hands of the Officer in that case. In the circumstances we find it difficult to agree with the conclusion of the learned Judge. We also do not agree with the suggestion implicit in the concluding part of his judgment that where the facts disclose an offence under section 26 of the Bihar Sales Tax Act resort should rather be had to the provisions of that section than to the general law even if the act amounts to an offence under the general law. We are, therefore, unable to accept his view. We, therefore, dismiss the appeal.

Along with this appeal Criminal Appeal No. 35 of 1961 was also heard and this judgment will govern the decision of that appeal also. There the facts are different only in one respect, in that the account book which was snatched away from the hands of the Assistant Superintendent of Commercial Taxes was in the process torn, part of it remaining in the hands of the Assistant Superintendent and a part in the hands of the dealer who snatched it away. Apart from that, there is no difference and the points which were urged before us were identical. For the reasons given by us we dismiss this appeal also.

V.S.

Appeals dismissed.

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SRI B. P. SINHA'S RETIREMENT.

The retirement of a Judge of the Superior Court, particularly that of an eminent Chief Justice, generally evokes a feeling of regret that his services will not be available any further. In reviewing the contribution of an outgoing Chief Justice of India one's mind instinctively recalls the great role played by his counterpart in the United States of America. It is not without significance that Judge Douglas entitled his book "From Marshall to Mukherji". It is said of John Marshall, who was Chief Justice from 1801 to 1835, that, over the years, through memorable judgments, he transformed the Supreme Court into a powerful tribunal occupying a position as important as that of the Congress or the President. He could do it by giving an imaginative approach and a powerful turn to the provision in Article VI of the U.S. Constitution that the Constitution shall be supreme law of the land. In our country, the position is not wholly analogous. The Indian Constitution has adopted the principle of Parliamentary supremacy. The Judiciary is clothed with independence but not with supremacy. Even in the United States, Justice Holmes points out that the Legislatures are ultimate guardians of the liberties of the people in quite as great a degree as the Courts. Apropos of the role of the Courts regarding the constitutionality of a statute, Patanjali Sastri, C.J., observed: "If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights as to which this Court has been assigned the role of a sentinel on the *qui vive*."

The Judge holds an office to which is annexed the function of guarding the supremacy of the law. But in law no formulae are final, and the resultants of a past generation seldom adequately measure the opposing forces of the next. Law has to be regarded as a form of social engineering playing a creative role in the building of a society. It becomes the duty of the Judge to look forward and to remember that the law must adjust itself to the social philosophy of the day, and in interpreting a statute the Judge should be animated by the consciousness that every legislation has an aim, that it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy or to formulate a plan of Government. The Courts are, at present, becoming more and more concerned with great social experiments; and law joins hands, as never before, with problems in economics, problems in political science, and problems in the techniques of administration. The outlook of the modern Judge has thus, in some respects, to be somewhat different from the traditional outlook of being guided essentially by the letter of the law.

The Law Commission has suggested that the person to be appointed as Chief Justice should be appointed at such an age as will give him at least a ten-year tenure of office, so as to enable him to create healthy traditions, to impart vigour and tone to the judicial administration, and to leave the impress of his own personality in regard to his exalted office. But within the fifteen years of its existence the Supreme Court has witnessed the succession of half a dozen Chief Justices. Hence, by and large, it has become rather difficult to state with confidence about any of them that he is bound to live in judicial history.

Sri Bhuvaneswar Prasad Sinha became the Chief Justice of India in 1959, having held office earlier as a Judge of the Supreme Court. Earlier still, he had been a Judge of the Patna High Court from 1943 to 1951 and from that year till 1954 he was Chief Justice of the Nagpur High Court. He had thus come to his exalted office with a wealth of judicial experience and knowledge of law. He possessed also the gift of clear analysis and luminous expression. Two of his relatively recent judgments

serve to illustrate. The judgment in *Kedar Nath Singh v. State of Bihar*¹, carries a cogent exposition of the legal position emerging from a consideration of sections 124-A and 505 of the Penal Code along with Article 19 (2) of the Constitution. Likewise, in *State of Rajasthan v. Mst. Vidhyawati*², the Chief Justice has enunciated in a lucid form the principle that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as much as any other employer.

Sri Sinha's tenure of office has witnessed the passing of the Advocates Act, creating a unified Bar for the whole country and vesting the power of enrolment of legal practitioners in the Bar Councils. The learned Chief Justice as the President of the Indian Law Institute has been taking keen interest in its working, though, in some quarters, there is a feeling that the quality of the research work done will have to be more impressive. Sri Sinha has been tireless in his advocacy of the need for an absolutely independent and pure judiciary at all levels, though at times the pronouncements of some of our leaders were apt to be sarcastic. His Lordship will carry with him in his retirement the good wishes of the Bar all over the country.

SECTION 10 OF THE ESTATE DUTY ACT, 1953.

By

V. SETHURAMAN, *Member, Income-tax Appellate Tribunal.*

In order to prevent avoidance of estate duty, the Estate Duty Act, 1953 enacts, by section 9, that property taken under a disposition made by the deceased to operate as an immediate gift *inter vivos* which had not been *bona fide* made two years or more before the death of the deceased shall be deemed to pass on the death. This period of two years is reduced to six months in the case of gifts made for public charitable purposes. (See Proviso to section 9 (1).) There is an exception to the rule enacted in section 9 (1) and that is, where the gift is in consideration of marriage or where the gift is proved to have been the normal expenditure of the deceased, subject to a maximum in both cases of a sum of Rs. 10,000, the period of two years will not be required to elapse. (See section 9 (2).) In such cases, even if the gift were made a moment before the death it will be excluded from the estate duty assessment of the estate of the donor on his death. Section 10 of the Estate Duty Act extends the statutory fiction of the property being taken as passing, where *bona fide* possession and enjoyment of the property was not assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. It is proposed in the following paragraphs to notice the scope of this provision.

In order to fully appreciate the scope of this provision, it is better to reproduce it here. It runs as follows :

“Section 10—Gifts whenever made where donor not entirely excluded.—Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that *bona fide* possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise :

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death.”

1. (1963) 1 S.C.J. 18 : (1963) 1 M.L.J. (S.C.) 40 : (1963) M.L.J. (CrI.) 25 : (1963) 1 An.W.R. (S.C.) 40.

2. (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. (S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70.

The substantive part of the section, it may be seen, falls into 2 parts viz.,

(a) *Bona fide* possession and enjoyment of the property taken under any gift must be immediately assumed by the donee.

(b) Such *bona fide* possession and enjoyment must be retained ;

(i) to the entire exclusion of the donor ; or

(ii) to the entire exclusion of any benefit to him by contract or otherwise. If any of these conditions are not satisfied, then the property though gifted prior to the statutory period of two years will be deemed to pass. Section 10 is in substantially identical terms with the law in U.K. as enacted in section 2 (1) (c) of the Finance Act, 1894 read with section 38 (2) (a) of the Customs and Inland Revenue Act, 1881 and section 11 (1) of the Customs and Inland Revenue Act, 1889.

The words used in the section are "*bona fide* possession and enjoyment". The expression "*bona fide*" is to be understood in the sense of real and genuine, as opposed to colourable. See *Attorney-General v. Richmond and Gordon (Duke)*¹ at page 475 per Lord Atkinson. Both possession and enjoyment must be assumed by the donee. The expression "possession and enjoyment" is followed by a singular verb "was not assumed". The corresponding U.K. provision is cast on slightly different language, and the tense used is such that it is difficult to find out whether the subject is singular or plural. Reference may however, be made in this context to section 38 (13) of the Finance Act, 1957, of U.K. where the singular is employed there. But the corresponding provision in section 102 (2) (d) of the New South Wales Stamp Duties Act, 1920-56, also contains a singular verb after the words "possession and enjoyment". This shows that the idea underlying the provision is a collective one, and possession and enjoyment is a single concept. Possession would normally denote enjoyment, but there can be enjoyment without possession e.g., where property is in the possession of donee. That is why obviously both the words are used. Possession in this context has been taken to be beneficial possession, and not mere physical possession. As Lord Russell put it in *Commissioner of Stamp Duties of New South Wales v. Perpetual Trustee Co., Ltd.*².

"The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty."

In *Norman Clyde Oakes v. Commissioner of Stamp Duties of New South Wales*³, it was clearly laid down :

"If the property is held in trust for the donee then the trustee's possession is the donee's possession for this purpose and it matters not that the trustee is the donor himself."

In re *Rose and others v. Inland Revenue Commissioners*⁴, the point arose as to when the gift was complete. In that case, the deceased the owner of 20,000 shares executed on 30th March, 1943 transfers in the form required by the company's articles of association. The transfers were stamped on 12th April, 1943 and registered in the books of the company on 30th June, 1943. The transferor died on 16th February, 1947. The statutory period after which any gift made would have been avoided for purposes of estate duty commenced on 10th April, 1943. Thus if in this case, the gift was on 30th March, 1943, then it was outside the statutory period and the deeming provision would have applied. The Crown in justifying the levy of estate duty contended

1. L.R. (1909) A.C. 466 (475) : 78 L.J. K.B. 998 : 101 L.T. 241.

2. L.R. (1943) A.C. 425 : (1943) 1 All E.R. 525 : 112 L.J. P. C. 55 : 168 L.T. 414 : 2 E.D.C. 790.

3. L.R. (1954) A.C. 57 : (1953) 2 All E.R. 1563 : (1954) 26 I.T.R. (E.D.) 1 : 3 E.D.C. 553.

4. (1952) 1 All E.R. 1217 (C.A.) : 3 E.D.C. 369 (C.A.) at 386 and 387.

that the gift was complete only on the date it was registered by the company. The Court of Appeal rejected the Crown's contention and held that the transferor was a trustee for the transferees from the date of the execution, as on that date, the donor had done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. For our present purpose it is enough to set out two short passages from the last portion of the judgment of Jenkins, L.J. :

"In other words in my view, the effect of these transactions, having regard to the form and operation of the transfers, the nature of the property transferred, and the necessity for registration in order to perfect the legal title, coupled with the discretionary power on the part of the directors to withhold registration, must be that, pending registration, the deceased was in the position of a trustee of the legal title in the shares for the transferees."

Later at the end of his judgment, he observed :

"In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with the delivery of the transfer and the certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and the transferee, and making the transferee the beneficial owner."

In the aforesaid case, it was held that the donee had assumed possession and enjoyment of the shares from the date of the transfer deed and that the donor was entirely excluded therefrom. Thus, barring the cases of the donor being the sole or joint trustee (and those cases where there is no dispute about the exclusion), the question arises as to when it can be said that the donor is entirely excluded from the property and the donee has retained possession and enjoyment to the entire exclusion of the donor. An early case throwing light on this aspect is the one decided by Hamilton, J. in *Attorney-General v. Secombe*¹. In 1897, the owner of a farm and a dwelling house gifted them to his nephew who resided with him. After the gift the donor resided in the house gifted until his death in 1906 and was also maintained by his nephew, without any kind of understanding or agreement therefor. The Crown claimed estate duty in this case on the ground that the donor was not entirely excluded, from possession and enjoyment. It was held that the donor was excluded and that duty was not payable. Hamilton, J., said, after referring to some earlier decisions :

"The principle there laid down, as I understand it, is that the possession and enjoyment or benefit from which the Act contemplates that the cedent or donor must be entirely excluded must be derived from some enforceable right, a benefit as the Lord President said (in *Lord Advocate v. Stewart*²), "which was part of his property before cession", and therefore, not merely a benefit which is derived from his being present for a greater or less time in the old house by the leave and licence of the donee."

In Australia, an analogous case arose in *Lang v. Webb*³, where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land. Issacs, J., said :

"The lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability. It was argued that as the rent was for full value, the lessee's possession and occupation was not a benefit. The argument is unimportant because the lease, at whatever rent, prevents the entire exclusion of the donor."

1. L.R. (1911) 2 K.B. 688 : 80 L.J.K.B. 913 : 105 L.T. 18 : 1 E.D.C. 589.

2. 8 F. 579 at p. 595.

3. (1912) 13 C.L.R. 503.

There is thus a clear conflict between the U.K. and Australian law on the point. While in U.K. the authority of *Attorney-General v. Secombe*¹, is not shaken by any later pronouncement, in Australia, the decision of *Lang v. Webb*², has been followed and has been referred to by the Privy Council in *Clifford John Chick v. Commissioner of Stamp Duties*³. In the last mentioned case, a father transferred by way of gift to one of his sons a pastoral property. About 17 months thereafter, the father and two of his sons (one of whom was the donee) formed a firm. Clause 5 of the deed provided that the business should be conducted on the respective holdings of the partners. All the respective holdings were to remain the property of the partners. That is, they were not treated as partnership property. The father was to manage the business and his decision on the affairs of the business was to be final. Estate duty was levied on the death of the father and section 102 (2) (d) was applied. The Privy Council upheld the assessment. It was observed :

“Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee.”

It was added :

“It is possible that in the consideration of this very difficult part of the subsection it may be pertinent in some cases to enquire whether the benefit derived by the donor is one that impairs or detracts from the donee's enjoyment of the gift. Their Lordships, with great respect, think that this is a matter which may require further examination, but, as they have already said, they are clearly of opinion that it is not a relevant consideration where the question arises under the first limb of the section and is whether the donor has been entirely excluded from the subject-matter of the gift, and they repeat that, in the present case that question can only be answered in the negative.”

At more than one place, the decision in *Lang v. Webb*², is referred to, and it is stated that the law “cogently stated” therein has been “consistently followed”. It would therefore, appear that the Privy Council decision has to be read in the context of the Australian law. It may be noted that the decision in *Attorney-General v. Secombe*¹, was cited, but it has not even been referred to with or without approval, thereby emphasising that the Privy Council was dealing with an Australian case in the setting of Australian law, and had no intention of casting any doubts on the current authorities in U.K.

As far as we in India are concerned, both sets of decisions are only of a persuasive value. It would, therefore, be necessary to consider which view accords more with the scope and object of the provision. Section 9 deals with gifts within a certain period before death. Section 10 is an exception, as it were, to the rule enacted in section 9. If the death occurs after, what can be called for convenience, the statutory period, then the provisions of section 9 will not help to avoid the gift for purposes of estate duty. That is why in section 10, the words “whenever made” are used. This is designed to import the statutory fiction of passing to those cases where the gift is even prior to the statutory period, since, if the gift is within the statutory period, section 9 would cover it. Further, section 10 applied only to gifts. See *Ranganathan v. Controller of Estate Duty*⁴. It will perhaps cover all the categories dealt with in section 9 where there is an element of bounty. Even in cases *prima facie* coming within section 9 or 10, if the transaction is not real and is merely a facade then there is no need to apply section 9 or 10. Where the transaction is real alone, it will be necessary for the Legislature to step in, and create a fiction. Therefore, in the case of a real transaction, situations may arise where the donor may retain control over

1. L.R. (1911) 2 K.B. 688 : 80 L.J.K.B. 913 : 623 : (1959) 37 I.T.R. (E.D.) 89 : 3 E.D.C. 915.
105 L.T. 18 : 1 E.D.C. 589.
2. (1912) 13 C.L.R. 503.
3. L.R. (1958) A.C. 435 : (1958) 2 All E.R.
4. (1963) 21 T.J. 441 : (1963) 2 M.L.J. 531 :
49 I.T.R. (E.D.) 137 : A.I.R. 1963 Mad. 432.

the property given. The transfer may only be a colourable, but a real device. In such a case, the Legislature provides for a test to see how far the transaction can be effective to get out of the operation of the estate duty liability. The first test is to see whether the transferee has assumed *bona fide* or real possession and enjoyment immediately after the transaction was put through. If there was no transfer of possession, there can be no gift and section 9 or 10 are not needed in such cases. Consistently with the nature of the property, there must be delivery of possession. We may take it that the Legislature in insisting on possession and enjoyment did not want anyone to be in doubt about this requirement.

The next test is to find out whether such possession and enjoyment was "thenceforward retained to the entire exclusion of the donor". This is the aspect we considered by reference to *Seccombe's case*¹ and *Chick's case*². In *Seccombe's case*¹ one of the items gifted was a house in which the donor was in permissive occupation after the gift. Supposing, varying the facts a little, the husband gives a house property to the wife who lets it out, and when the tenant is in occupation the husband goes there for collecting the rent for his wife, or for taking shelter from rain, will section 10 be attracted? If section 10 as read in *Chick's case*² were to be literally applied then the answer will be, "Yes". If *Seccombe's case*¹ is the guide, the answer will be "No". *Seccombe's case*¹, appears to provide the better answer. Examples can be multiplied to show that the result emerging from *Chick's case*² is not satisfactory. There were criticisms against this decision and the British Parliament stepped in, and disowned the intention attributed to it in *Chick's case*², and passed section 35 of the Finance Act, 1959, by which it is provided that if full consideration in money or money's worth was given by the donor, for taking back possession of the property given, then the provision for deeming will not apply. What the Legislature has sought to achieve by this amendment appears to be the proper effect of the earlier deeming provision.

A third test is to see whether the donor obtained a benefit by contract or otherwise. The decision did not throw any light on the question as to whether the provision for exclusion of possession and enjoyment was a separate and independent requirement, apart from "benefit by contract or otherwise". *Chick's case*² now clarifies that the two are independent requirements. Any benefit by contract or otherwise would attract the operation of section 10. *Seccombe's case*¹, establishes that the benefit must arise under an enforceable contract, though not necessarily between the same persons as are parties to the gift, and that the words "contract or otherwise" must be construed in accordance with the *ejusdem generis* rule. "It is possible for a donee in the full and unrestrained enjoyment of his gift to use or spend it in a way that happens to produce some advantage to the donor without there being any loss or disadvantage to the donee. But such advantage has been held not to be a benefit within the meaning of the section." See *Norman Clyde Oakes v. Commissioner of Stamp Duties, New South Wales*³. This is a proposition deduced from another decision of the House of Lords in *St. Aubyn v. Attorney-General*⁴, possibly because it is not a direct authority for the above view. That is why in *Chick's case*², the Privy Council says that this is a matter which may require further examination. See passage extracted at page 9 supra. It appears that the passage reproduced above from *Oakes' case*³ accords with the scheme of the section, as what is necessary is to show a transfer of rights to the donee and an incidental benefit not referable to the gift will have no significance for this purpose.

This leads us to an allied question as to what is the benefit that is spoken of by the section. In *St. Aubyn v. Attorney-General*⁴, it has been held that a benefit which does not arise by way of reservation out of that which was given was not comprehended by the provision. Lord Simonds observed :

1. L.R.(1911) 2 K.B. 688; 80 L.J.K.B. 913; 105 L.T. 18; 1 E.D.C. 589.

2. L.R.(1958) A.C. 435; (1958) 2 All E.R. 623; (1959) 37 I.T.R. (E.D.) 89; 3 E.D.C. 915.

3. (1954) A.C. 57; (1953) 2 All E.R. 1563; (1954) 26 I.T.R. (E.D.) 1; 3 E.D.C. 553.

4. L.R.(1952) A.C. 15; (1951) 2 All E.R. 473; 3 E.D.C. 292.

"The benefit, if it is to attract duty to the subject of the gift, must be a benefit referable to it. The words are not easy to construe, but they clearly import that the owner of property may in certain circumstances retain a benefit when he makes a gift and yet the subject-matter of the gift be not dutiable."

Lord Radcliffe after referring to the earlier cases stated :

"All these decisions proceed upon a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest or an equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift."

The idea embodied in the above passage is that the gift need not be of the entire interest and that there may be reservations which are not given. In order to appreciate the scope of this, it is useful to examine a few of the decisions which have propounded this proposition. In *Munro and others v. Commissioner of Stamp Duties of New South Wales*¹, M, the owner of 35,000 acres of land on which he carried on the business of grazier orally agreed with his 6 children to carry on the business in partnership with them. M was to be the sole manager of the business. In 1913, he made direct gifts to 4 of them and made settlements for the remaining 2 on certain trustees. The transfers were taken subject to the partnership agreement and on the understanding that any partner could withdraw and work out his land, separately. But later in 1919, under a partnership deed between the parties, it was agreed that during the lifetime of M no partner should withdraw from the firm. It was held that the property comprised in the transfers was the land separated from the partnership rights therein and that section 102 (2) (d) of the New South Wales Stamp Duties Act, 1920-31 did not affect this. Lord Tomlin observed in the course of the judgment :

"Further the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not in their Lordship's opinion a benefit referable in any way to the gift."

It may be seen that the above decision has a close parallel to the one in *Chick's case*². The main distinguishing feature to be found on facts is that in *Chick's case*², the gift was anterior to the transaction of partnership. This aspect is emphasised by the Privy Council in the following passage in *Chick's case*² :

"In the first place, it is not disputed that the property was given outright by the deceased to his son. . . . It follows that the decision of this Board in *Munro v. Commissioner of Stamp Duties*¹, on which the appellants relied has no application to the present case. It must often be a matter of fine distinction what is the subject-matter of a gift. If as in *Munro's case*¹, the gift is of a property showing certain of the rights which appertain to complete ownership, the donor cannot, merely, because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given."

The decision of the Privy Council in *Munro's case*¹, has been followed by the House of Lords in *St. Aubyn v. Attorney-General*³. A simplified version of the complicated facts of that case appear in *Norman Clyde Oakes v. Commissioner of Stamp Duties*⁴. For our present purpose it is enough to notice this simplified version, as the essence of the decision is brought out therein. By virtue of certain transactions by Lord St. Levan, the settled property consisted of 50,000 ordinary shares of a

1. L.R. (1934) A.C. 61 : 103 L.J.P.C. 18 : 150 L.T. 145 : 2 E.D.C. 462.

2. L.R. (1958) A.C. 435 : (1958) 2 All E.R.

623 : (1959) 37 I.T.R. (E.D.) 89 : 3 E.D.C. 915.

3. L.R. (1952) A.C. 15 : (1951) 2 All E.R. 473 : 3 E.D.C. 292.

4. L.R. (1954) A.C. 57 : (1953) 2 All E.R. 1963 : (1954) 26 I.T.R. (E.D.) 1 : 3 E.D.C. 553.

company, and sums of £7,50,000 payable by the said company in instalments and £1,00,000 immediately payable by the company. Lord St. Levan had life interest in the settled property. This life interest on the shares was surrendered and the persons next entitled subject to this life interest assumed possession. He, by exercising the power of appointment available to him, transferred to himself absolutely the sums of £7,50,000 and £1,00,000. The Crown claimed estate duty on the demise of Lord St. Levan contending that there was no entire exclusion from possession or of any benefit by contract or otherwise mainly because of the rights which he retained to receive the money from the company. It was held that this alleged benefit neither incumbered the enjoyment of the gift nor arose by way of reservation out of that which was given. The deeming provision was held not to apply. The relevant passages from the speeches of Lord Simonds and Lord Radcliffe appear earlier in this article. In the case of *Norman Clyde Oakes v. Commissioner of Stamp Duties of New South Wales*¹, the donor after making the gift continued to manage the property and received remuneration therefor. It was held that on his death duty became payable on the ground that this remuneration was a benefit. It was observed that a trustee was not permitted to take remuneration and that the provision for remuneration was a benefit taken by the deceased. The contrast in such a case was pointed out as follows :

“The contract is between reserving a beneficial interest and only giving such interests as remain on the one hand, and on the other hand reserving the power to take benefit out of, or at the expense of interests which are given.”

Their Lordships concluded that the case before them fell within the latter class.

The result of this survey shows that one has to see what is given and then to find out if the donor is entirely excluded and enjoys no benefit by contract or otherwise. Thus, the nature of the transaction would determine the liability. The moral is that the persons who may have to offer advice should take care.

It may be asked whether the reservation in such cases will not come in for duty. The result of the findings in all these cases is that property in the gifts had passed to the donees during the lifetime of the donor. If the reservation or retention is dutiable, there must be some provision to make it dutiable. There are special provisions like section 7 which import a statutory fiction of passing where there is a determination of life interest or interest ceasing on death. If the interest reserved or retained is not covered by that or other deeming provisions so far as may be applicable, then there can be no levy of duty on the death of the donor.

The proviso to section 10 applies to a case where the donor had retained certain rights which he surrendered prior to the statutory period of two years. In such a case, the deeming provision does not apply. This only shows that the transaction has to be seen as it emerges at the time of the death and not as it originated. This provides an opportunity to the donor, to cast a second look at his transaction and see if he can get out of the operation of section 10 by making a timely surrender of any benefit.

1. L.R. (1954) A.C. 57 : (1953) 2 All E.R. 1563 : (1954) 26 I.T.R. (E.D.) 1 : 3 E.D.C. 553.

[SUPREME COURT.]

S. K. Das, Acting C.J.
M. Hidayatullah and
K. C. Das Gupta, JJ.
29th August, 1963.

Kharkan v.
The State of U.P.
Cr. A. No. 95 of 1961.

Criminal Procedure Code (V of 1898), sections 236, 237 and 403—Prior acquittal—Effect.

The charges on which that acquittal took place had nothing whatever to do with the charges on which there is conviction in the present appeal. A plea of *autrefois acquit* which is statutorily recognised in India under section 403 of the Criminal Procedure Code arises when a person is tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237.

Section 236 provides for a situation where it is doubtful what offence has been committed. When a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, that section permits that the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of such offences. Section 237 enables the Court to convict an accused charged with one offence for a different offence where the facts show that a different offence has been committed.

Neither of these provisions is applicable to the present facts because the two offences were distinct and spaced slightly by time and place. The trials were separate as the two incidents were viewed as distinct transactions. Even if the two incidents could be viewed as connected so as to form parts of one transaction it is obvious that the offences were distinct and required different charges.

D. S. Tewatia and K. B. Mehta, Advocates, for Appellant.

O. P. Rana and C. P. Lal, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

S.K. Das, Acting C.J., K. Subba Rao,
Raghubar Dayal, N. Rajagopala
Ayyangar and J.R. Mudholkar, JJ.
29th August, 1963.

T. Devadasan v.
The Union of India.
Petition No. 87 of 1963.

Constitution of India (1950), Articles 14, 15, 16 read with Article 335—Reservation of seat, for backward classes in educational institution—Rule to carry forward.

By majority.—Applying its earlier decision *M.R. Balaji and others v. The State of Mysore*, A.I.R. 1693 S.C. 649, the Court held that the reservation of more than half of the seats in an educational institution for being filled from members of the backward classes is unconstitutional. What this Court has laid down there would also apply to the present case.

Such being the result of the operation of the carry forward rule we must, on the basis of the decision in *Balaji's case* hold that the rule is bad. Indeed, even in *The General Manager, Southern Railway v. Rangachari*, (1961) 2 M.L.J. (S.C.) 71 : (1961) 2 An. W.R. (S.C.) 71 : (1961) 2 S.C.J. 424 : (1962) 2 S.C.R. 586, reservation of vacancies to be filled by promotion was upheld by this Court. . . .

We would like to emphasise that the guarantee contained in Article 16 (1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

R. Gopalakrishnan, Advocate, for Petitioner.

R. Ganapathy Iyer, and *R.N. Sachthey*, Advocate, for Respondents.

G.R.

Petition partly allowed.

[SUPREME COURT.]

M. Hidayatullah and
K. C. Das Gupta, JJ.
29th August, 1963.

Hukma v.
The State of Rajasthan.
Cr. A. No. 152 of 1962.

Sea Customs Act (VIII of 1878), sections 167 (81), 178-A—*Mens rea*—*Land Customs Act* (XIX of 1924), section 3.

Section 3 of the Land Customs Act authorizes the Central Government to appoint by notification in the official gazette one person to be the Collector of Land Customs for any area adjoining a foreign frontier and specified in the notification. The section also authorizes the Central Government to appoint by a similar notification such other persons as it thinks fit to be Customs Officers for the same area. "Foreign frontier" has been defined in section 2, clause (e) of the Act as the frontier separating any foreign territory from any part of India. "Land Customs area" has been defined in clause (g) of the same section as any area adjoining a foreign frontier for which a Collector of Land Customs has been appointed under section 3. From the definition of foreign frontier in clause (e), it is clear that an area adjoining the frontiers separating any foreign territory from any part of India, is within these words.

We have, therefore, come to the conclusion that the construction put by the High Court on the notification is right, and Lal Singh, being an officer in the District of Barmer which is mentioned in the Schedule, was an officer for the entire area which formed the jurisdiction of the Collector of Land Customs, Delhi, including the place where the seizure was made, was therefore competent to make the seizure.

S.K. Kapur, *S. Murthy*, *B.N. Kirpal* and *K.K. Jain*, Advocates, for Appellants.

H.R. Khanna, Advocate and *B.R.G.K. Achar*, Advocate for *P.D. Menon*, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, N. Rajagopala
Ayyangar and J.R. Mudholkar, JJ.*
30th August, 1963.

Union of India v.
H.C. Goel.
C.A. No. 645 of 1962.

Civil Service Classification, Control and Appeal Rules, Rule 55—Findings by the enquiry officer—Government's competence to differ from the findings—High Court's powers—Article 311 of the Constitution.

Besides, it would be apparent that if the respondent's argument is valid, then the second notice would serve very little purpose. If, at that stage the Government is bound to accept the findings of the enquiry officer, the opportunity which is intended to be given to the public servant to show cause not only against the proposed punishment but also against the findings recorded against him, would be defeated, because on the respondent's case Government cannot alter the said findings. In our opinion, the contention raised by the respondent is patently unsound and must be rejected.

Therefore, we have no hesitation in holding that the High Court was in error in coming to the conclusion that the appellant was not justified in differing from the findings recorded by the enquiry officer. As we have just indicated, if it is held that the report of the enquiry officer is not binding on the Government, then the Constitutional safeguard afforded by Article 311 (1) and (2) cannot be said to have been contravened by the appellant and the grievance made by the respondent in that behalf must fail.

Though we fully appreciate the anxiety of the appellant to root out corruption from public service, we cannot ignore the fact that in carrying out the said purpose, mere suspicion should not be allowed to take the place of proof even in domestic enquiries. It may be that the technical rules which govern criminal trials in Courts may not necessarily apply to disciplinary proceedings, but nevertheless, the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as to disciplinary enquiries held under the statutory rules. We have very carefully considered the evidence led in the present enquiry and borne in mind the plea made by the learned Attorney-General, but we are unable to hold that on the record, there is any evidence which can sustain the finding of the appellant that charge No. 3 has been proved against the respondent. It is in this connection and only incidentally that it may be relevant to add that the Union Public Service Commission considered the matter twice and came to the firm decision that the main charge against the respondent had not been established.

The result is, though the appellant succeeds on the principal point of law raised in the appeal the appeal fails, because, on the merits, we hold that no case had been made out for punishing the respondent. The appellant to pay the costs of Respondent.

C. K. Daphtary, Attorney-General for India (*R. H. Dhebar*, Advocate, with him),
for Appellant.

N. C. Chatterjee, Senior Advocate (*A. N. Sinha* and *K. K. Sinha*, Advocates,
with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, N. Rajagopala Ayyangar and
J.R. Mudholkar, JJ.
3rd September, 1963.

Gopal Narain v.
State of Uttar Pradesh.
Petition No. 12 of 1962.

Uttar Pradesh Municipalities Act (XI of 1916), section 128 (1)—Articles 14 and 19 of the Constitution—Power of Municipal Board to impose tax.

The Court approved the decision of the Full Bench of the Allahabad High Court in *Bareilly Municipality v. Kundan Lal*, A.I.R. 1963 S.C. 562 and held that on a construction of the provisions of the Act that the power vested in the Board to select part of the municipality within which to levy a tax was not an arbitrary power but one which is controlled by the purpose which was intended to be achieved by the Act itself.

The differences between the old city and the Civil Lines area are so pronounced in the matter of amenities that there is a reasonable relation between the taxes imposed and the geographical classification made for the purpose of taxation. The notification imposing the said taxes does not infringe Article 14 of the Constitution.

J. P. Goyal, Advocate, for petitioner.

C. B. Agarwala, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 1.

G. S. Pathak, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 2.

G.R.

Petition dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, N. Rajagopala Ayyangar
and J. R. Mudholkar, JJ.
4th September, 1963.

Kaushalya Devi v. Mool Raj.
Transfer Petition No. 15 of 1963.

Criminal Trial—Magistrate making affidavit in support of the Administration—Propriety.

Criminal Procedure Code (V of 1898), sections 527 and 253 (2)—Affidavit by a Magistrate—Separating the Judiciary from the Executive.

Unfortunately in some parts of the country, the policy of separating the Judiciary from the Executive has still not been implemented. Nevertheless, we are confident that even in areas where such separation has not taken place, members of the judiciary are functioning without fear or favour. But when an instance like the present comes to the notice of this Court, it naturally causes us considerable concern. The learned Magistrate who has been ill-advised to make the present affidavit did not realise that when he entered the arena and made an affidavit on behalf of the Administration, his statement that the Executive has no influence in his Court, is apt to sound idle and meaningless. A little reflection would have satisfied him of the gross impropriety of his action in making an affidavit like the present. It is an elementary principle of the rule of law that Judges who preside over trials, civil or criminal, never enter the arena. In criminal trials, particularly, it is of utmost importance that the Magistrate who tries the case must remain fearless, impartial and objective; and so, no argument is required in support of the proposition that if a Magistrate chooses to make an affidavit challenging the application made by an accused person whose case is pending in his Court, makes the said affidavit on behalf of the Administration, and in the affidavit puts in a strong plea opposing the transfer, all essential attributes of a fair and impartial criminal trial are immediately put in jeopardy. It is very much to be regretted that the Delhi Administration chose to request the Magistrate to make an affidavit and

that the Magistrate accepted the said request and made the affidavit on the lines we have already indicated. That being so, even without considering the merits or the contentions raised by the petitioner, we think it is expedient for the ends of justice that the case pending against the petitioner and three other persons should be transferred from the Court of the learned Sub-Divisional Magistrate, Delhi, to a Court of competent jurisdiction in Saharanpur, U. P.. We accordingly direct that the papers in this case should be sent to the District Magistrate, Saharanpur, who should nominate a Magistrate of competent jurisdiction in his district to try this case.

P. C. Misra, Advocate, for Petitioner.

R. N. Sachthey, Advocate, for Respondent No. 5.

G.R.

Petition accepted.

[SUPREME COURT.]

A.K. Sarkar, M. Hidayatullah, and
J. C. Shah, JJ.
5th September, 1963.

Anand Nivas Private Ltd. v
Anandji Kalyanji's Pethi
C. A. No. 168 of 1963.

Bombay Rent and Lodging House, Rates (Control) Act, 1947, as amended—Transfer of Property Act—A statutory tenant and sub-tenant under him—Company as sub-tenant—Increase of Rent and Mortgage Interest (Restriction) Act, 1920—Indian Registration (Bombay Amendment) Act, (XIV of 1939)—Rule of 'Lis Pendens'.

By Majority :—The protection which a sub-tenant is entitled to claim against his own landlord (that is the head tenant) becomes on determination of the head tenancy available to him against the head landlord, but the condition on which such claim may be sustained is that there is a lawful sub-letting. A statutory tenant is, a person who on determination of his contractual right is permitted to remain in occupation so long as he observes and performs the conditions of the tenancy and pays the standard rent and permitted increases. His personal right of occupation is incapable of being transferred or assigned, and he having no interest in the property there is no estate on which subletting may operate. If it be assumed that a statutory tenant has the right of subletting, some very surprising consequences may ensue. A statutory tenant by parting with possession of the premises would forfeit all rights in the premises occupied by him, but he would still if section 14 is construed as suggested by the Company be able to create an interest in the person inducted in the premises not derivatively but independently, for the statutory tenant had no interest in the premises and the protection granted by the statute is by the very act of transfer of possession extinguished. Again even though the sub-tenant of a statutory tenant may not be protected, because the bar against such subletting is not effectively removed by section 15 (2), he would still be entitled to claim the rights of a tenant under section 14 on determination of the tenancy of the head tenant. Having regard to these considerations there can be little doubt that a sub-lessee from a statutory tenant under the Act acquires no right of a tenant in the premises occupied by him.

We therefore hold that before the date of the institution of the suit, Maneklal as a statutory tenant had no right to sublet the premises and the Company acquired no right of a tenant on the determination of the tenant's right by virtue of section 14 of the Act.

It was urged—on the assumption that a statutory tenant has an interest in the property occupied by him, and that by purporting to sublet he transferred that

interest—that the doctrine of ‘*ut lite pendente nihil innovetur*’ enunciated in section 52 of the Transfer of Property Act did not operate against the Company and the Company was not bound by the decree obtained against the tenant. Reliance in support of that plea was placed upon the Transfer of Property Act and the Indian Registration (Bombay Amendment) Act, XIV of 1939. By this Act the rule of ‘*lis pendens*’ applies only when a notice of the pendency of the suit in which any right to immovable property is directly and specifically in question, is registered under section 18 of the Registration Act. The Act is somewhat clumsily worded; it applied not to proceedings in Court but to notices in respect of suits or proceedings. But the reason for the method of drafting adopted is not far to seek. Condition of registration of notice relating to the suit is only to apply where the suit is in respect of property situate in the area to which the Act is extended. A suit relating to immovable property may, in certain circumstances, lie in a Court other than the Court within the territorial jurisdiction whereof it is situate (e.g. under clause 12 of the Letters Patent and section 17 Code of Civil Procedure) and it appears that the Legislature intended to make the Act applicable only to transfers of title to immovables only in areas where the litigants were sufficiently sophisticated to understand the importance of registration. As Bombay Act XIV of 1939, is intended to apply to the situs of immovable property and not the Court proceeding, application of the rule of ‘*lis pendens*’ is, in respect of proceedings relating to immovable properties situate in certain areas, made conditional upon the registration of the notice of the pendency of the suit.

I. M. Nanavati, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellant.

S. T. Desai, Senior Advocate, (*M. M. Shah* and *I. N. Shroff*, Advocates, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K. Subba Rao*,
K.N. Wanchoo, *N. Rajagopala Ayyangar* and
J. R. Mudholkar, JJ.
11th September, 1963.

Rameshwar Shaw v.
District Magistrate, Burdwan.
Petition No. 145 of 1963.

Preventive Detention Act, (IV of 1950) section 3 (1) 7 (1) and 11—Order of detention if can be passed against a person who is already in detention or in jail.

The question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case.

If a person is already in jail custody, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under section 3 (1) (a), of the Preventive Detention Act and this basis is clearly absent in the case of the petitioner in the instant case and therefore, in the circumstances of this case, his detention is not justified by section 3 (1) (a) and is outside its purview. The District Magistrate, Burdwan, who ordered the detention of the detenu acted outside his powers conferred on him by section 3 (1) (a) when he held that it was necessary to detain the petitioner in order to prevent him from acting in

a prejudicial manner. That being so, the detention of the petitioner is not justified by section 3 (1)(a). In this connection, we may add that the Assam High Court in two of its decisions appears to have taken the same view about the scope and effect of the relevant provisions of section 3 (1) (a) of the Act, vide *Labaram Deka Barua and another v. The State*, A.I.R. 1951 Assam 43 and *Haridas Deka v. State*, A.I.R. 1952 Assam, 175.

R. K. Garg, S. C. Aggarwal, D. P. Singh and M. K. Ramamurthi, Advocates of *M/s. Ramamurthi & Co.*, for petitioner. (Petitioner also in person).

B. Sen, Senior Advocate, (*P. K. Bose*, Advocate, with him), for Respondents

G.R.

Petition allowed.

[SUPREME COURT.]

A.K. Sarkar, J.C. Shah and Raghubar Dayal, JJ.

State of Andhra Pradesh v.
Gundugola Venkata Suryanarayana
Garu.

12th September, 1963.

C.A.No. 483 of 1961.

Civil Procedure Code (V of 1908), section 80—Discrepancy between notice and plaint—Effect.

In construing the notice under section 80, Civil Procedure Code, the Court cannot ignore the object of the Legislature to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading but not so as to make undue assumptions the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or errors may be ignored.

The cause of action as set out in the notice remained unchanged in the suit, and it is not claimed that the relief set out in the plaint is different from the relief set out in the notice. The only discrepancy between the notice and the plaint is that the notice was given by two persons intimating that an action would be started against the Government for and on behalf of the inamdars on the same cause of action and for the same relief.

K. Bhimashankaram, Senior Advocate, (*B. R. G. K. Achar and R. N. Sachthey*, Advocates, with him), for the Appellant.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao, K.N. Wanchoo, J.C. Shah and Raghubar Dayal, JJ.

18th September, 1963.

Babu Lal v.
State of U.P.
C. A. No. 708 of 1962.

Criminal Procedure Code (V of 1898), Chapter 35, section 195 (1) (b) (c)—Sections 192, 463 and 464 of the Penal Code (XLV of 1860).

The offences of forgery and of fabricating false evidence for the purpose of using it in a judicial proceeding are distinct, and within the description of fabricating false evidence for the purpose specified in section 479-A, Criminal Procedure Code, the offence of forgery is not included. In any event the offence penalised under section 471, Indian Penal Code, can never be covered by sub-section (1) of section 479-A. Therefore for taking proceeding against a person who is found to have used a false document dishonestly or fraudulently in any judicial proceedings, resort may only be had to section 476, Code of Criminal Procedure.

We may point out that in the observation made by this Court in dealing with the true interpretation of section 479-A, Code of Criminal Procedure, the words "and section 471" appear to have crept in by oversight. That is clear from the

observation made by the Court earlier in the judgment, that the discussion relating to the exclusive operation of section 479-A of the Code of Criminal Procedure was restricted to the offence of intentionally giving false evidence in any stage of judicial proceeding.

C. B. Agarwala, Senior Advocate, (*K. P. Gupta*, Advocate for *K. R. Krishnaswamy*, Advocate, with him), for Appellant.

C. P. Lal, Advocate, for Respondent No. 1.

S. P. Sinha, Senior Advocate, (*M. I. Khawaja*, Advocate, with him), for Respondents No. 2 to 5.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K. Subba Rao*
K. N. Wanchoo, *J. C. Shah* and
Raghubar Dayal, JJ.
20th September, 1963.

Jagdish Mitter v.
Union of India.
C.A. No. 718 of 1962.

Post and Telegraphs Manual Vol. 2; General Regulations Rule 126—Section 240 (1) and (3) of the Government of India Act, 1935—Article 311 of the Constitution.

It is also now settled that the protection of Article 311 can be invoked not only by permanent public servants, but also by public servants who are employed as temporary servants, or probationers, (vide *Parshotam Lal Dhingra v. The Union of India* (1958) S.C.J. 217: (1958) S.C.R. 828 at pages 856-857 (Page 858), and so; there can be no difficulty in holding that if a temporary public servant or a probationer is served with an order by which his services are terminated, and the order unambiguously indicates that the said termination is the result of punishment sought to be imposed on him, he can legitimately invoke the protection of Article 311 and challenge the validity of the said termination on the ground that the mandatory provisions of Article 311 (2) have not been complied with. In other words, a temporary public servant or a probationer cannot be dismissed or removed from service without affording him the protection guaranteed by Article 311 (2).

As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal. That being so, we are satisfied that the High Court was in error in coming to the conclusion that the appellant had not been dismissed, but had been merely discharged. It is conceded that if the impugned order is construed as one of dismissal, the appellant has been denied the protection guaranteed to temporary servants under section 240 (3) of the Government of India Act, 1935, or Article 311 (2) of the Constitution, and so, the order cannot be sustained.

M. K. Ramamurthi, *R. K. Garg*, *S. C. Agarwal* and *D. P. Singh*, Advocates, of *M/s. M. K. Ramamurthi & Co.*, for Appellant.

S. V. Gupta, Additional Solicitor-General of India (*V.D. Mahajan*, Advocate and *B.R.G.K. Achar*, Advocate for *P.D. Menon*, Advocate, with him), for Respondent.

G.R.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT:—S. K. DAS, *Acting Chief Justice*, K. SUBBA RAO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Ghanshyamdas

.. Appellant*

v.

The Regional Assistant Commissioner of Sales Tax,
Nagpur and others

.. Respondents.

Central Provinces and Berar Sales Tax Act, (XXI of 1947), sections 11 and 11-A—Scope—“Escaped assessment”—Interpretation—Registered dealers—Assessment proceeding when commences and when terminates—No proceedings at all initiated—Turnover if escapes assessment.

The appellant, a registered dealer under the Central Provinces and Berar Sales Tax Act, 1947 filed his voluntary return of turnover in *bidis* only for the first quarter of 1949-50, committing default in respect of the rest. For the next year 1950-51, he did not file any return for any quarter. The assessing authority assessed the appellant for all the quarters for both the years under section 11-A of the Act, holding that the turnover for the period had “escaped assessment.” The assessee thereupon filed writ petitions for quashing the assessment on the ground that they were time-barred, proceedings not having been initiated within three calendar years from the expiry of the relevant periods. The writ petitions were allowed by a single Judge of the High Court, but reversed in appeal by a Bench of the same High Court. On appeal

Held, by majority (S. K. Das, *Acting C.J.*, K. Subba Rao, N. Rajagopala Ayyangar and J.R. Mudholkar, JJ; Raghubar Dayal, J, *dissenting*).—that the expression “escaped assessment” in section 11-A of the Central Provinces and Berar Sales Tax Act, 1947 includes that of a turnover which has not been assessed at all, because for one reason or other no assessment proceedings were initiated and therefore no assessment was made in respect thereof.

The assessment proceedings must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment. Before the final order of assessment it could not be said that the entire turnover of a dealer or a part thereof had escaped assessment.

A statutory obligation to make a return within a prescribed time does not *proprio vigore* initiate assessment proceedings; but the proceedings would commence after the return was submitted and would continue till a final order of assessment is made in regard to the return.

In construing the meaning of the expression “escaped assessment” in section 11-A of the Central Provinces and Berar Sales Tax Act, 1947, there is no reason why the said expression should bear a more limited meaning than what the same expression bears in section 34 (1) of the Indian Income-tax Act, 1922 and section 14 of the Business Profits Tax Act, 1947. All the three Acts are taxing statutes and the three relevant sections therein are intended to gather revenue which has improperly escaped, and hence *pari materia*.

Per Raghubar Dayal, J.—The proceedings for assessment commenced from the prescribed date for submitting the return which the registered dealer is required to submit under section 10 (1). No notice is necessary to be issued to him for the purpose of assessment. The statute, by the provisions of section 10 (1), gives him the required notice.

The turnover in this case, for the assessment years 1949-50 and 1950-51, could not be said to have escaped assessment within the meaning of section 11-A of the Act, since the proceedings for assessment must be held to be pending.

Appeals from the Orders, dated 13th December, 1957, of the Madhya Pradesh High Court in Letters Patent Appeals Nos. 208 and 207 of 1956 respectively.

J. M. Thakar and H. M. Thakar, Advocates, and O. C. Mathur, J. B. Dadachanji and Ravinder Narain, Advocates, of M/s. J. B. Dadachanji & Co., for Appellant (in both the Appeals).

B. Sen, Senior Advocate, I. N. Shroff, Advocate, with him, for Respondents (in both the Appeals).

The Court delivered the following Judgments :

Subba Rao, J. (for the majority).—These two appeals by certificate raise the question of the true interpretation of the meaning of the expression “escaped assess-

ment" in section 11-A of the Central Provinces and Berar Sales Tax Act, 1947 (XXI of 1947), hereinafter called the Act.

The facts in Civil Appeal No. 101 of 1961 are as follows : The appellant is the manager of a joint Hindu family firm carrying on business in bidis. He is registered as a dealer under section 8 of the Act. Every registered dealer under the Act is required to furnish quarterly returns of his turnover within one month from the end of the quarter. For the year 1949-50, *i.e.*, for the period from October 22, 1949 to November 9, 1950, he submitted a return of his turnover on October 5, 1950 for one quarter only and made a default in respect of the other quarters. The Assistant Commissioner of Sales Tax, Nagpur, issued a notice to the appellant on August 13, 1954 in Form No. 11 under section 11 (1) and (2) of the Act in respect of the turnover of the firm for the said period. The appellant thereafter filed the returns for the three quarters in respect of which he had made default, but in the assessment proceedings he contended, *inter alia*, that the Assistant Commissioner could not assess his escaped turnover as he could only do so within three years from the expiry of the period in respect whereof his turnover had escaped assessment. The Sales Tax Commissioner rejected the said contention, proceeded with the assessment and determined the tax liability at Rs. 15,846. Aggrieved by the said order, the appellant filed a petition under Article 226 of the Constitution in the High Court of Judicature at Nagpur mainly on the ground that the proceedings before the Sales Tax Commissioner were barred by time under section 11-A of the Act.

Civil Appeal No. 102 of 1961 is in respect of assessment of sales tax on the turnover of the appellant for the year 1950-51. The appellant had not filed any return for the whole year. The Assistant Commissioner of Sales Tax, Nagpur, served a notice on the appellant on October 15, 1954 under section 11 (4) of the Act. The appellant filed his returns and produced the account books under protest and also raised objections that the assessment proceedings were barred by limitation under section 11-A of the Act. The Assistant Commissioner rejected his plea of limitation and determined his tax liability at Rs. 16,537-5-0. The appellant filed another petition under Article 226 of the Constitution in the said High Court for a similar relief.

Both the petitions were heard together by Kotval, J. The learned Judge, following the decision of a Division Bench of that Court in *Firm Sheonarayan Matadin v. Sales Officer, Raipur*¹, held that, as the notices were issued beyond three years from the expiry of the relevant periods, the Sales Tax Commissioner had no jurisdiction to make the assessments. On that ground he quashed the said assessments.

The respondent filed Letters Patent Appeals to a Division Bench of the said High Court. On the formation of the State of Madhya Pradesh, the above appeals were transferred to the Madhya Pradesh High Court and were heard by a Division Bench consisting of Hidayatullah, C.J., and Choudhuri, J. The Division Bench held that section 11-A of the Act could apply only to a case where there was a final assessment and that in the instant cases the first assessment proceedings were pending and, therefore, the said section had no application thereto. In the result, by a common judgment, they set aside the order of Kotval, J. Hence the present appeals.

Mr. J. M. Thakar, learned counsel for the appellant, raised before us the following four points: (1) The expression "escaped assessment" in section 11-A of the Act would apply also to a case where there was no assessment at all. (2) Even if the first assessment proceedings were pending before the appropriate authority the said authority could only make the assessment within three years from the date of the commencement of the said proceedings, which, according to him, would start from the date of issue of notice by the said authority in the manner prescribed by the Central Provinces and Berar Sales Tax Rules, 1947, hereinafter called the Rules.

(3) In the present case no proceedings in respect of the said assessments were pending before the said authority. And (4) as only a part of the fourth quarter in Civil Appeal No. 102 of 1961 falls within three years, the proceedings in respect of the said entire quarter would be barred under section 11-A of the Act and, in any view, only the turnover escaped in respect of the period between October 16, 1951 and October 31, 1951 could be assessed.

Mr. B. Sen, learned counsel for the respondent, controverted the said arguments and contended that in the case of registered dealers there was a statutory obligation to make a return and, therefore, the proceedings must be deemed to be pending from the date an assessee was bound to make his return and that as the proceedings in the present case were pending by statutory force, there was no scope for invoking the provisions of section 11-A of the Act. In Civil Appeal No. 102 of 1961 he raised the point that a calendar year in section 11-A must be calculated from January to December and if so calculated no part of the fourth quarter would be beyond three years, but he did not pursue the line of argument.

The main question in the appeals is the true construction of the provisions of section 11-A of the Act. The material provisions thereof may be set out. They read :

“Section 11-A.—(1) If in consequence of any information which has come into his possession, the Commissioner is satisfied that any turnover of a dealer during any period..... has escaped assessment..... the Commissioner may, at any time within three calendar years from the expiry of such period..... proceed in such manner as may be prescribed to..... assess..... the tax payable on any such turnover.....”

Under this section if the turnover of a dealer during any period has escaped assessment, the Commissioner may at any time within three calendar years from the expiry of such period proceed in the manner prescribed to assess the tax payable on the said turnover. The crucial expression for the present purpose is “escaped assessment”. What does it mean ? Does it include, as learned counsel for the appellant contends, a case where no assessment has been made at all or, as learned counsel for the respondent contends, takes in only the post-assessment detection of evasion of tax ? This problem has received the attention of Courts in different contexts.

In *Commissioner of Income-tax, Bombay v. Pirojbai N. Contractor*¹, the words “escaped assessment” in the Indian Income-tax Act were defined. It was held therein that the said words were wide enough to include cases where no notice under section 22 (2) of the Income-tax Act had been issued to the assessee and therefore his income had not been assessed at all under section 23 thereof. The said view, has been assumed to be correct by this Court in *Maharaj Kumar Kamal Singh v. Commissioner of Income-tax, Bihar and Orissa*², and *Maharajadhiraj Sir Kameshwar Singh v. State of Bihar*³, and extended to cover a case where the first assessment was made in due course but a part of the income escaped therefrom. This Court, in *Commissioner of Income-tax, Bombay v. Narsee Nagsee & Co*⁴, construing the provisions of section 14 of the Business Profits Tax Act, 1947, reviewed the law on the subject and came to the following conclusion :

“All these cases show that the words ‘escaping assessment’ apply equally to cases where a notice was received by the assessee but resulted in no assessment at all and to cases where due to any reason no notice was issued to the assessee, and, therefore, there was no assessment of his income.”

It is true that the said decisions were given with reference to either section 34 (1) of the Income-tax Act or section 14 of the Business Profits Tax Act, but so far as the present enquiry is concerned the said sections are *pari materia* with section 11-A of the Act. In construing the meaning of the expression “escaped assessment”

1. I.L.R. (1937) Bom. 310 : 39 Bom. L.R. S.C. 257 : 35 I.T.R. 1 (S.C.).
123 : 10 I.T.C. 77 : A.I.R. 1937 Bom. 214 : 3. 37 I.T.R. 388 : (1959) S.C.J. 292 : (1960)
5 I.T.R. 338. 1 S.C.R. 301 : A.I.R. 1959 S.C. 1295.
2. 1959 S.C.J. 230 : (1959) 1 M.L.J. (S.C.) 4. 40 I.T.R. 307, 313 : A.I.R. 1960 S.C.
92 : (1959) 1 An.W.R. (S.C.) 92 : A.I.R. 1959 1232.

in section 11-A of the Act there is no reason why the said expression should bear a more limited meaning than what it bears under the said two Acts. All the three Acts are taxing statutes and the three relevant sections therein are intended to gather the revenue which has improperly escaped.

A Division Bench of the Madras High Court in *The State of Madras v. Balu Chettiar*¹, following the decision of a Full Bench of that Court, held that where an assessee did not file at any time a return of his turnover for a year and, therefore, there was no assessment made, the turnover escaped assessment. It was observed therein :

"Whether it was a case of omission or of deliberate concealment on the part of the assessee, he did not submit any return. It was his default that led to the escape of the turnover for 1951-52 from assessment to the tax lawfully due. It was the whole of the turnover for that year that escaped assessment."

It is not necessary to multiply citations. We, therefore, hold that the expression "escaped assessment" in section 11-A of the Act includes that of a turnover which has not been assessed at all, because for one reason or other no assessment proceedings were initiated and therefore no assessment was made in respect thereof.

The next question is whether a turnover could be said to escape assessment if proceedings in respect of the first assessment were pending and no final order of assessment was made therein.

In *In re Lachhiram Basantlal*², Rankin, C.J., tersely observed :

"Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof."

This dictum laid down a clearly understandable principle. How can an escape of a turnover from assessment be predicated before the assessment is completed?

The Judicial Committee in *Rajendra Nath Mukherjee v. Income-tax Commissioner*³, relied upon this dictum in rejecting the contention to the contrary raised by the assessee before them, and endorsed the said view. That decision turned upon the interpretation of section 34 of the Indian Income-tax Act. There, Burn & Co., an unregistered firm, made a return of their total income on January 13, 1928. On February 25, 1928, the Income-tax Officer made an assessment on Martin & Co., the partners whereof purchased the business of Burn & Co., in respect of the combined incomes returned by Martin & Co., and Burn & Co. The High Court held that under the Income-tax Act the income of the said firm could not be aggregated and that the income of each must be separately assessed. Thereafter, on November 8, 1930, an assessment was made on Burn & Co., on their income as returned by them on January 13, 1928. It was contended that under the Income-tax Act it was not competent to make any assessment to tax after the expiry of the year for which the tax was charged except in the cases provided for under section 34 of the Income-tax Act. It was held by the Judicial Committee that the income of Burn & Co., had not escaped assessment within the meaning of section 34 of the Income-tax Act. It was observed therein :

"If an assessment is not made on income within the tax year then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under section 34 with its time limitation. This involves reading the expression "has escaped assessment" as equivalent to "has not been assessed". Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word "escaped". That the word "assessment" is not confined in the statute to the definite act of making an order of assessment appears from section 66, which refers to "the course of any assessment". To say that the income of Burn & Co., which in January, 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Co., has escaped assessment in 1927-28 seems to their Lordships an inadmissible reading. The fact that section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have "escaped" assessment within the statutory meaning".

1. (1956) 7 S.T.C. 519, 522 : (1956) 2 M.L.J. 313 : A.I.R. 1957 Mad. 681.

2. (1930) I.L.R. 58 Cal. 909.

3. (1933) L.R. 61 I.A. 10, 15-16 : 66 M.L.J. 121.

As section 34 of the Income-tax Act had no application and as there was no other time-limit prescribed or necessarily implied under that Act, it held that the assessment was not out of time.

This decision is a clear authority for the position that if a return was duly made, the assessment could be made at any time unless the statute prescribed a time-limit. This can only be for the reason that the proceedings duly initiated in time will be pending and can, therefore, be completed without time-limit. A proceeding is said to be pending as soon as it is commenced, and until it is concluded. On the said analogy, the assessment proceedings under the Sales Tax Act must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment. Before the final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for the assessment was not completed and, if completed, it might be that the entire turnover would be caught in the net.

But the more difficult question is, when do the assessment proceedings under the Act in respect of a registered dealer commence and when do they terminate? While learned counsel for the appellant contends that the said proceedings under the Act start only after the appropriate authority issued a notice under section 10 (1) or section 11 (2) or section 11 (5) of the Act, Learned counsel for the respondent contends that whatever may be said in the case of an unregistered dealer, in the case of a registered dealer the proceedings commence from the date fixed in the registration certificate within which the said dealer has a statutory obligation to furnish his return.

To appreciate the rival contentions it is necessary to notice the relevant provisions of the Act and the Rules. Under section 4 of the Act, every dealer whose turnover exceeds the specified limits prescribed under sub-section (5) thereof shall be liable to pay tax in accordance with the provisions of the Act on all sales effected by him. Under section 8 no dealer shall, while being liable to pay tax under the Act, carry on business as a dealer unless he has been registered as such and possesses a registration certificate. Part IV of the Rules prescribes the manner in which a dealer shall get himself registered under the Act. Under section 8, if the dealer satisfies the requirements prescribed in that regard, the Sales Tax Officer grants him a registration certificate in Form II, which specifies the particulars, such as, the location of the business, the nature of the business, etc. The said Officer enters the name of every dealer registered in a ledger maintained under section 9 and issues copies of registration certificates for exhibition in the places of their business. Under one of the columns in that Form the period for which and the date on which the return has to be furnished has to be mentioned. A list of such registered dealers is also published under rule 17. Under the Act, no dealer, who is liable to pay tax thereunder, shall carry on business unless he has been registered as such and possesses a registration certificate. It is, therefore, clear that registration is mainly conceived in the interest of revenue, to facilitate collection of taxes and to prevent the evasion thereof.

Next we come to the provisions dealing with the manner in which a registered dealer will be assessed to tax. Under section 10 every registered dealer shall furnish such returns by such dates to such authority as may be prescribed. Rule 19 prescribes the manner in which such a return has to be furnished. Thereunder every registered dealer shall furnish to the appropriate Sales Tax Officer quarterly returns within one calendar month from the expiry of the quarter to which the returns relates and in case he has more than one place of business in the Province, he shall submit a consolidated return for all the places of business and also a return separately for each of the places of business within two calendar months from the said date. It also says that each of such returns submitted shall be accompanied by a treasury receipted chalan in Form V in respect of the tax due according to the return. In short he has to file a return or returns in the prescribed form within the prescribed time and also pay the tax payable by him along with the returns. Under section 11 (1) if the Commissioner is satisfied that the return furnished by the dealer in respect of a period is correct and complete, he assesses the dealer on it. If he does not accept

it, under clause (2) thereof he shall serve the dealer with a notice appointing the place and date for enquiry and after enquiry he shall assess him to tax under rule 3. Rule 31 prescribes that the notice under section 11 (2) shall be served on the dealer in Form II. It may be stated that the mention of sub-section (1) in that rule appears to be a mistake for no notice is contemplated under that sub-section. If the registered dealer fails to furnish his return under section 10 (1) of the Act in the manner prescribed within the time prescribed under sub-section (3) thereof, the Commissioner, after giving a reasonable opportunity of being heard, may impose on him by way of penalty a sum not exceeding one-fourth of the amount of the tax which may be assessed on him under section 11. Rule 32, which is an omnibus provision, says that in such an event, a notice in Form III has to be issued on him. Under sub-section (4) of section 11, if a registered dealer makes the defaults mentioned therein the Commissioner shall, in the prescribed manner, assess him to the best of his judgment. Rule 32 also governs the procedure for making the said assessment. Rule 33 prescribes the maintenance of a register of cases instituted under section 11. Rule 34 gives the form of the order to be made and rule 39 provides for the preparation of assessment record.

At this stage an argument advanced by learned counsel for the appellant, namely, that under section 10 (1) of the Act the Commissioner has to give notice in the prescribed manner to a registered dealer, may be considered. Section 10 (1) reads :

“Every such dealer as may be required so to do by the Commissioner by notice served in the prescribed manner and every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed.”

The word “dealer”, unless there is anything repugnant in the subject or context, means any person who carries on the business of selling or supplying goods and in its wide meaning it certainly takes in both a registered dealer and a dealer who has not registered himself under the Act. The question, therefore, is whether there is anything repugnant in the subject or context of section 10 to limit the word “dealer” in the first part of sub-section (1) to a dealer other than a registered dealer. Sub-section (1) is in two parts : the first part speaks of a dealer and the second part of a registered dealer and the sub-section says that both of them shall furnish the returns. If the dealer in the first part includes a registered dealer, the mention of “every registered dealer” in the second part will become redundant, for a registered dealer is included in the expression “dealer”. A construction which would attribute redundancy to a Legislature shall not be accepted except for compelling reasons. This redundancy disappears if the expression “dealer” in the first part excludes a registered dealer mentioned in the second part. This legislative intention is further made clear by the provisions of sections 14 and 17 of the Act. Section 14 imposes a duty on every registered dealer or every dealer on whom notice has been served to furnish returns under sub-section (1) of section 10 to keep a true account of the value of goods bought and sold by him ; and section 17 imposes a duty on the said two categories of dealers to inform the prescribed authority regarding changes of business. The distinction between the two categories of dealers is maintained not only in section 10 but also in sections 14 and 17. It is, therefore, clear that under sub-section (1) of section 10, the Commissioner need not issue a notice to a registered dealer for furnishing the relevant returns, but a statutory obligation is imposed on the said dealer to do so by such dates and to such authority as may be prescribed.

Now coming to the case of a dealer who did not register himself under the Act, the position is different. There is no statutory obligation cast on him by any section to submit a return. His is really a case of evasion from his obligation to get himself registered under the Act. Section 10 (1) enables the Commissioner to issue a notice to him requiring him to furnish a return in the prescribed manner. In his case also the same procedure as prescribed in sections 10 (3), 11 (1) and 11 (2) has to be followed in the matter of assessment. But sub-section (5) of section 11 introduces a stringent provision to prevent evasion of tax. Under that sub-section if upon information the Commissioner is satisfied that any such dealer, who is liable to pay tax under the Act in respect of any period, has wilfully failed to apply for registration, he

shall at any time within three calendar years from the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed in the manner as may be prescribed to assess to the best of his judgment the amount of tax due from the dealer in respect of such period and of subsequent periods. He may also direct the dealer to pay, by way of penalty, in addition to the amount of tax so assessed a sum not exceeding $1\frac{1}{2}$ times that amount. So in the case of a dealer liable to pay tax, but who has failed to register himself under the Act, the Commissioner may issue a notice to him under rule 22 and assess him under section 11⁽⁵⁾, and in the case of evasion, on subsequent information, the Commissioner can assess him within three calendar years from the expiry of the period in respect of which he was liable to pay tax and for subsequent years and also impose a penalty on him. It is clear from this provision that in the case of such a dealer the assessment can be made only within three calendar years from the expiry of the period in respect whereof he has been liable to pay tax under the Act. If the contention of Learned counsel for the respondent should prevail, in the case of a registered dealer there would be no limitation in the matter of assessment, whereas in the case of a dealer who evaded law, he would have the benefit of the three years' limitation.

From the foregoing discussion it is seen that in the case of a registered dealer there are four variations in the matter of assessment of his turnover : (1) He submits a return by the date prescribed and pays the tax due in terms of the said return ; the Commissioner accepts the correctness of the return and appropriates the amount paid towards the tax due for the period covered by the return. (2) The Commissioner is not satisfied with the correctness of the return ; he issues a notice to him under section 11 (2), and makes an enquiry as provided under the Act, but does not finalise the assessment. (3) The registered dealer does not submit a return ; the Commissioner issues a notice under section 10 (3) and section 11 (4) of the Act. And (4) the registered dealer does not submit any return for any period and the Commissioner issues notice to him beyond three years. If the return was accepted and the amount paid was appropriated towards the tax due for the relevant period, it means that there has been a final assessment in regard to the said period. If any turnover escaped assessment, clearly it can be reopened only within the period prescribed in section 11-A. In the case where a return has been made, but the Commissioner has not accepted it, and has issued a notice for enquiry, the assessment proceedings will certainly be pending till the final assessment is made. Even in a case where no return has been made, but the Commissioner initiated proceedings by issuing a relevant notice either under section 10 (3) or under section 11 (4), the proceedings will be pending thereafter before the Commissioner till the final assessment is made. But where no return has been made and the Commissioner has not issued any notice under the Act, how can it be held that some proceedings are pending before the Commissioner when none existed as a matter of fact ? We are concerned in this case with the last contingency.

It is manifest that in the case of a registered dealer the proceedings before the Commissioner starts factually when a return is made or when a notice is issued to him either under section 10 (3) or under section 11 (2) of the Act. The acceptance of the contention that the statutory obligation to file a return initiates the proceedings is to invoke a fiction not sanctioned by the Act. The obligation can be enforced by taking a suitable action under the Act. Taking of such an action may have the effect of initiating proceedings against the defaulter. The default may be the occasion for initiating the proceedings, but the default itself *proprio vigore* cannot initiate proceedings. Proceedings in respect of the assessment of the turnover for the relevant period cannot, therefore, be said to be pending before the Commissioner. Learned counsel for the respondent contends that the certificate of registration is itself a notice to the registered dealer to furnish his returns within the prescribed time. Reliance is placed upon Form II wherein under the appropriate column the particulars in regard to a dealer's return and the date within which he should submit it are given. The main purpose of the registration certificate is to localise dealers with taxable turnovers and to facilitate the collection of taxes. The registration certificate enables the dealer to carry on the business, Neither section 8 which

enjoins such registration on every dealer with taxable turnover nor rule 8 which prescribes the particulars to be incorporated in a certificate suggests that the certificate itself is a statutory notice to a dealer. The objects of the certificate and the statutory notices under the Act are different and the former cannot be equated with the latter.

Rule 33 provides that the assessing authority shall maintain a register in Form XIII in which he shall enter the details of each case initiated under rules 31 and 32. Rule 31 says that on receipt of a return or returns required under rule 19, 20 or 22 from any dealer, the assessing authority shall serve on him a notice in Form XI. Rule 32 prescribes, *inter alia*, the manner of assessment under sub-section (3) of section 10, clause (a) of sub-section (4) of section 11, and sub-section (5) of section 11. Form XIII gives the serial number, name of the dealer, nature of the business, gross turnover, taxable turnover as determined for the relevant years and the date of issue of notice in Form XI or Form XII. A perusal of the said rules and the forms discloses that the proceedings in the case of a registered dealer start only on the receipt of a return or returns required to be furnished under the Rules. Under rule 33 a register is maintained giving the details of each case "instituted" under Rules 31 and 32. Rule 34 enacts that a case instituted would be pending till an order of assessment was made. No doubt it would be pending till a final order of assessment was made by the highest tribunal or Court under the Act.

At this stage some of the decisions cited at the Bar may conveniently be noticed. A Full Bench of the Bombay High Court in *Bisesar House v. State of Bombay*¹, held that a notice under sub-section (2) of section 11 of the C. P. and Berar Sales Tax Act, 1947, could not be issued more than three years after the expiry of the period for which it was proposed to make the assessment; but an assessment under sub-section (1) of section 11 could be made more than three years after the expiry of such period. There, a dealer made his return and paid the tax, which according to him was due for three chargeable accounting years. The Commissioner of Sales-tax served notices on him under section 11 (2) in respect of the first two years more than three years after the end of the chargeable accounting years. The Court drew a distinction between sub-sections (1) and (2) of section 11 and came to the conclusion that in the former case it was only a formal appropriation of the amounts paid towards the tax due and therefore it could be done even after three years, but in the latter case the issue of notice under section 11 (2) was in a substantial sense an initiation of proceedings by the Commissioner and his failure to tax these turnovers would constitute "escaped assessment" within the meaning of section 11-A of the Act and therefore it could be reopened only within 3 years prescribed thereunder. The learned Judges, if we may say so with respect, did not consider the question, in what circumstances assessment proceedings could be held to be pending? As we have held that the submission of a statutory return would initiate the proceedings and that the proceedings would be pending till a final order of assessment was made on the said return, no question of limitation would arise.

A Division Bench of the same High Court, in *Ramakrishna Ramnath v. Sales Tax Officer, Nagpur*², made a distinction between proceedings under section 11 (4) (a) and those under section 11 (2) of the Act in that proceedings under section 11 (2) are for the purpose of assessment whereas those under section 11 (4) (a) are taken *in terrorem* and the dealer is penalised by a best judgment assessment in default of compliance. On that reasoning they held that the period of limitation prescribed under section 11-A might apply to a proceeding under section 11 (2), but no such period of limitation was laid down in the Act in respect of a proceeding under section 10 (3) or section 11 (4) (a) of the Act. We find it rather difficult to appreciate the reasoning on which the learned Judges distinguished the Full Bench decision. But the question of pendency of proceedings was not raised before the Division Bench and was not considered by it. For the foregoing reasons we hold that a statutory obligation to make a return within a prescribed time does not *proprio vigore* initiate the assessment proceedings before the Commissioner; but the proceedings would

1. (1958) 9 S.T.C. 654 : A.I.R. 1959 Bom. 130,

2. (1960) 11 S.T.C. 811 : A.I.R. 1960 Bom. 281,

commence after the return was submitted and would continue till a final order of assessment was made in regard to the said return.

Now let us apply the said legal position to the facts of Civil Appeal No. 101 of 1961. The appellant has to submit quarterly returns and assessments are made on the basis of the said returns ; that is to say, he has to be assessed for his turnover separately in respect of each quarter. Therefore, the question of escape of assessment has to be considered on the ground that each quarter is a separate period for the assessment. For the year 1949-50 *i.e.*, for the period from October 22, 1949 to November 8, 1950, he had to submit 4 returns for the four quarters. But he had submitted only one return on October 5, 1950, for one quarter. No assessment was made in respect of any of the four quarters. So the assessment proceedings must be held to be pending before the Commissioner only in respect of the quarter for which the appellant had made the return. In respect of the other quarters no proceedings could be said to be pending before the Commissioner. The Tribunal has no jurisdiction to issue a notice under section 11-A with respect to the quarters other than that covered by the return made by the appellant.

So far as Civil Appeal No. 102 of 1961 is concerned, the appellant had not submitted any returns for the year 1950-51 *i.e.*, for the period from November 10, 1950 to October 31, 1951. The Assistant Commissioner of Sales Tax issued a notice to him on October 15, 1954, in Form XII purporting to be under section 11 (4) of the Act. The said notice was within 3 years from October 16, 1951, which fell within the 4th quarter of the concerned year. Under section 11-A of the Act the period of 3 years has to be calculated from the expiry of the period in regard where to any turnover has escaped assessment. As the unit of assessment is a quarter, the period in section 11-A can only mean a quarter and it cannot be further split up into months, weeks and days. The said period is the fourth quarter and it expired on October 31, 1951. If so, it follows that the Commissioner has to assess the turnover in respect of the entire fourth quarter as the notice was issued within three years from the expiry of the said quarter.

But in this case the Commissioner assessed the appellant in respect of the turnover of the entire year without showing separately the assessment of tax payable in respect of each quarter. We, cannot, therefore, confine the relief to be given to the appellant in these appeals to the period barred under section 11-A of the Act. We would, therefore, set aside the assessments in both the appeals giving liberty to the respondent to make the assessment separately for the periods not barred under section 11-A of the Act either because return was filed, as in the first case, or because the last quarter was within the period of three years, as in the second case.

In the result, the appeals are allowed with costs throughout. One hearing fee.

Raghubar Dayal, J.—I am of opinion that the appeals should be dismissed as the turnover for the years 1949-50 and 1950-51 could not be said to be turnover which escaped assessment, within the meaning of that expression in section 11-A of the Central Provinces and Berar Sales Tax Act, 1947 (XXI of 1947), hereinafter called the Act and therefore the notices issued by the Assistant Commissioner of Sales Tax in 1954 under section 11 (2) cannot be said to be notices issued under section 11-A beyond the period within which they could have been issued.

It is not disputed that a turnover cannot be said to have escaped assessment if the proceedings for the assessment of the sales tax on that turnover be pending. The question then is whether proceedings for assessment of the turnover for these two years were pending when the impugned notices were issued. To determine this question we have to see when such proceedings for the assessment of the sales tax on the turnover of a dealer in a certain period commences.

All dealers whose turnover during a year exceed the limits laid down in sub-section (5) of section 4 of the Act are liable to pay sales tax in accordance with the provisions of the Act. All such dealers have to get themselves registered and obtain a registration certificate *vide* section 8. The registered dealer is required by section 10 (1) to furnish the prescribed returns by prescribed dates to the prescribed authority.

Rule 19 of the Rules provides for the furnishing to the Sales Tax Officer quarterly returns in Form IV within one calendar month from the expiry of the quarter to which the return relates. In certain cases, such a return is to be submitted within two calendar months. The amount of tax calculated on the turnover shown in the return is to be deposited in the treasury and the treasury receipt in Form V is to accompany the return. If the registered dealer furnishes the necessary return, the Sales Tax Officer can assess on the amount of turnover shown in the returns in case he considers them to be correct and complete : *vide* section 11 (1). If he be not so satisfied he has to serve a notice under sub-section (2) of section 11 on the registered dealer to take the various steps he requires for satisfying him about the correct amount of the turnover and, on his computing this amount, he has to assess the tax in accordance with sub-section (3) of section 11 of the Act.

The Sales Tax Officer can also require an unregistered dealer to furnish returns by a certain date, in view of the provisions of sub-section (1) of section 10 and, if the dealer submits such returns, he can make the assessment on the basis of the returns if satisfied with their correctness, or he may serve another notice under section 11 (2) on the dealer to take steps to satisfy him about the correct amount of the turnover and, if the dealer responds to the second notice, he assesses him, after necessary inquiry, to tax under section 11 (3).

So far, the procedure for assessment of tax is the same, both for the registered dealer and the ordinary dealer, in case both of them furnish the returns of the turnover as required by the provisions of sub-section (1) of section 10 and also comply, if required, with the provisions of sub-section (2) of section 11.

Different procedures, however, have to be followed if the two types of dealers do not file returns or, after filing returns, do not respond to the notice issued under sub-section (2) of section 11. The Act does not provide for the Sales Tax Officer's taking steps for the assessment of the tax on the ground of the unregistered dealer's not complying with either notice, *i.e.*, when the unregistered dealer does not submit a return, or, after submitting a return which is not accepted, does not respond to the notice issued under sub-section (2) of section 11.

The Sales Tax Officer can, however, proceed against such a dealer under sub-section (5) of section 11 and will probably do so as the conduct of the unregistered dealer would tend to confirm the information which led him to issue notice under section 10 (1) ; but his action will be not on the ground that the dealer had made default in furnishing the return or had failed to comply with the notice issued under sub-section (2) of section 11 but will be on the ground that according to his information the dealer had been liable to pay tax under the Act in respect of that period and had, nevertheless, wilfully failed to apply for registration. Under the provisions of sub-section (5) of section 11 he, after giving the dealer reasonable opportunity of being heard, can proceed to assess the tax to the best of his judgment within three calendar years from the expiry of the period in respect of the turnover of which he was liable to be assessed to tax. The dealer, in such a case, has not only to pay the tax assessed, but has to pay the penalty which is not to exceed one and a half times the amount of the tax assessed. If such a dealer had been one to whom a notice under sub-section (1) of section 10 had been issued and had failed, without any sufficient cause, to comply with the requirements of that notice, he could also be ordered to pay, by way of penalty, a sum not exceeding one-fourth the amount of the tax which is assessed on him under section 11, in view of the provisions of sub-section (3) of section 10.

It will be seen that though the Sales Tax Officer has to proceed to make the assessment within three calendar years of the period whose turnover was liable to tax, there is no time limit within which he must finish the assessment proceedings. They are simply to be started within the prescribed period of time, but can be finished at any later period.

It may also be noticed here that the 'period of three years' in sub-section (5) section 11 was substituted by the amending Act XX of 1953 in place of the

expression 'from the commencement of this Act and thereafter within twelve months' and that section 11-A which deals with the assessment of the turnover escaping assessment was also introduced by the same Act and that these amendments were given retrospective effect from the 1st of June, 1947, the date when the Act originally came into force. Section 11-A empowers the Sales Tax Officer to proceed to assess or re-assess turnover, including turnover which escaped assessment, within three years from the expiry of that period.

The procedure to be followed against the registered dealer, in case he does not furnish the return in respect of any period by the prescribed date—which he is required to do by sub-section (1) of section 10—or, having furnished such returns, failed to comply with the notice issued under sub-section (2) of section 11, is different. Sub-section (4) of section 11 empowers the Sales Tax Officer, in such circumstances, to assess the registered dealer to the best of his judgment, in the prescribed manner. He has, however, to give a further notice to the registered dealer in case the registered dealer has not furnished the return at all. The registered dealer can also be made to pay a penalty, if his failure to furnish the return is without any sufficient cause, in accordance with the provision of sub-section (3) of section 10. There is no time limit fixed for the Sales Tax Officer to take action against the registered dealer under sub-sections (2) and (4) of section 11.

The question then is, when do the proceedings for the assessment of sales tax, commence against the registered dealer? I am of the view that they commence from the prescribed date for his submitting the return which he is required to submit by sub-section (1) of section 10. No notice is necessary to be issued to him for the submitting of the return for the purpose of assessment. The statute, by the provisions in sub-section (1) of section 10, gives him the required notice to the effect that he is to submit the necessary returns by the dates prescribed by the Rules. The registration certificate issued to him mentions the period of the dealer's year, the prescribed return period and the dates by which the dealer had to furnish the returns. The registered dealer is, in this way, in no worse position than an ordinary dealer who receives a notice from the Sales Tax Officer for submitting the returns by a certain date. The object of the notice to submit a return is nothing but the obtaining of the material for the Sales Tax Officer to determine the amount of the turnover and if, assessable to tax, to assess the tax due on that turnover. The notice is a step towards the proceedings for the assessment of the sales tax. In the case of the unregistered dealer, the Sales Tax Officer commences the proceedings for assessment by the issue of a notice under sub-section (1) of section 10, and in the case of a registered dealer, the statute has already fixed the date for the furnishing of the return and therefore has set in motion the process for the assessment of the sales tax by the Sales Tax Officer. I do not see any good reason why the statutory notice to the registered dealer be not considered to be at par with the notice issued to the ordinary dealer by the Sales Tax Officer and why it should not be taken to initiate the assessment proceedings just as the issue of a notice by the Sales Tax Officer would have initiated the proceedings against the ordinary dealer. The failure of the registered dealer to furnish the return enables the Sales Tax Officer to assess the tax to the best of his judgment, of course, after giving an opportunity to the registered dealer of being heard. It would be incongruous if the Sales Tax Officer be held not to have initiated the assessment proceedings against the registered dealer and yet, on the failure of such a dealer to furnish the returns, to proceed in the very first instance to assess tax on the dealer to the best of his judgment. Such a power of taxing to the best of his judgment is an indication of the fact that the dealer had defaulted in respect of some proceedings connected with the assessment of tax and thus has made himself liable to tax on the best judgment basis instead of a tax on the computed amount of turnover according to the records. His default lies in his not submitting the return of turnover and not depositing the tax due on the turnover shown in the return. The payment of tax as a result of the statutory notice under section 10 (1) and rule 19 well points to the conclusion that the statutory notice and rule initiate the assessment proceedings against the registered dealer at least from the date of

the close of the quarter for which the turnover is to be furnished and tax is to be paid.

The mere fact that the Sales Tax Officer cannot proceed against an unregistered dealer who, though liable to pay a tax, did not get himself registered, after the expiry of three years from the period the turnover in which was liable to tax, cannot lead to the conclusion that the Sales Tax Officer cannot take necessary steps to assess a registered dealer under sub-section (2) and (4) of section 11 after the expiry of three years from the period whose turnover he proceeds to assess, for the simple reason that section 11 or any other provision of the Act does not lay down any such restriction on the Sales Tax Officer's powers under these sub-sections.

Such a power in the Sales Tax Officer does not contravene the provisions of Article 14 of the Constitution. The registered dealer and the unregistered dealer belong to different classes. The former is one whose liability to tax is admitted. The other has admitted no such liability. The Sales Tax Officer can find out about the liability of the unregistered dealer to tax only by issuing a notice to him under sub-section (1) of section 10 when he thinks that such a dealer might be liable to tax. It is only when the information in his possession is sufficiently strong and trustworthy as to satisfy him that a certain unregistered dealer is liable to pay sales tax and has wilfully failed to apply for registration that he can take action under sub-section (5) of section 11. The circumstances in which the Sales Tax Officer can take action against the unregistered dealer are different from the circumstances in which he takes action against the registered dealer. I am therefore of opinion that the Sales Tax Officer does not contravene Article 14 of the Constitution as contended for the appellant, if he takes action against a registered dealer under sub-section (2) or (4) of section 11 even after the expiry of three years from the period whose turnover is to be assessed.

It is to be noticed that the Act, as originally enacted, did not have section 11-A. That was introduced in 1953 and made retrospective from June 1, 1947. Amendment was made in 1953, in section 11 (5) and it made the period of limitation for proceeding to assess tax three years. No amendment providing limitation was however made in section 11 (2) and (4) in 1953. This must be deliberate and indicates the intention of the Legislature not to limit the period during which action can be taken under section 11 (2) and (4).

The Register of Cases in Form XIII of the Rules And Forms is for cases instituted under sections 10 (3), 11, 11-A and 22-C of the Act. Its columns do not show when the assessment of tax proceedings commence. Still its column 14 is meant for 'Amount of penalty imposed, if any, with relevant section under which it is imposed and reference to defaulters' list. This shows that the Sales Tax Officer maintains a list of registered dealers who had defaulted in not complying with the notices under section 10 (1) or 11 (2) or under any other provision which makes the registered dealer liable to penalty. The maintenance of the defaulter's list indicates that the Sales Tax Officer initiates proceedings for tax assessment prior to his issuing notices under section 10 (3) and that this must be after the expiry of the date for furnishing returns referred to in section 10 (1).

In view of the opinion I have expressed above, it is not necessary to decide what the precise scope of the expression 'turnover escaping assessment' in section 11-A is.

It follows that the impugned notices were properly issued by the Assistant Commissioner of Sales Tax to the appellant and that these appeals fail. I would accordingly dismiss these appeals with costs.

ORDER BY THE COURT :—In accordance with the opinion of the majority, the appeals are allowed with costs throughout, one hearing fee.

V.B.

Appeals allowed,

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Dhanvantrai Balwantrai Desai

.. Appellant*

v.

The State of Maharashtra

.. Respondent.

Penal Code (XLV of 1860), section 161 read with Prevention of Corruption Act (II of 1947), sections 5 (1) (d) and 5 (2)—Conviction and sentence under—Whether the presumption raised against the appellant could be held to have been rebutted by the explanation given by him inasmuch as it was both reasonable and probable—Evidence Act (I of 1872), section 114—Presumption—Nature of.

The plain meaning of section 4 (1) of the Prevention of Corruption Act (II of 1947) undoubtedly requires the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more.

In such a case the presumption arises not under section 114 of the Evidence Act (I of 1872), but under section 4 (1) of the Prevention of Corruption Act. Whereas under section 114 of the Evidence Act it is open to the Court to draw or not to draw presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the Court to draw such presumption, under section 4 (1) however, if a certain fact is proved, that is, where any gratification (other than legal remuneration) or any valuable thing is proved to have been received by an accused person the Court is required to draw a presumption that the person received that thing as a motive or reward such as is mentioned in section 161 of the Penal Code (XLV of 1860). Therefore the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under section 114 of the Evidence Act, and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. The words "unless the contrary is proved" occurring in section 4 (1) of the Prevention of Corruption Act make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible.

Appeal by Special Leave from the Judgment and Order, dated the 3rd August, 1960 of the Bombay High Court in Criminal Appeal No. 282 of 1960.

A. S. R. Chari, Senior Advocate (*M. K. Ramamurthi, R. K. Garg, D. P. Singh, S. C. Agarwal, L. M. Atmaram Baukhanwala and K. R. Chaudhri*, Advocates, with him), for Appellant.

R. L. Anand and D. R. Prem, Senior Advocates (*R. H. Dhebar and R. N. Sachthey*, Advocates, with them), for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—In this appeal by Special Leave from the judgment of the High Court of Bombay affirming the conviction and sentences passed on the appellant in respect of offences under section 161, Indian Penal Code and section 5 (1) (d) of the Prevention of Corruption Act, 1947 (II of 1947) read with section 5 (2) thereof, the only point urged is that the presumption raised against the appellant under section 4 of the Prevention of Corruption Act must be held to have been rebutted by the explanation given by him inasmuch as that explanation was both reasonable and probable.

In order to appreciate the contention it is necessary to state certain facts.

In the year 1954 the appellant was appointed Resident Engineer for Lighthouses and posted to Bombay. He was due to retire in January, 1955 but he was given extensions from time to time. The complainant, M. M. Patel (who will hereafter be referred to as the complainant) is a building contractor. It was proposed to re-construct a lighthouse at Tolckshwar Point which is situate on the West Coast, somewhere between Ratnagiri and Karwar. The complainant submitted a tender for the construction on 21st March, 1956. That tender was accepted on 30th June, 1956 and a work order was issued to him. The general conditions governing the contract are contained in the set of papers inviting tenders.

The complainant commenced the work in November, 1956. It would appear that the Overseer supervising the work was not satisfied with the manner in which the contractor was carrying on the work. As a result, in December, 1956, the appellant had to bring the fact to the complainant's notice and warn him to carry out the work according to the specifications contained in the notice inviting tenders.

It may be mentioned that just near the place where the lighthouse was being constructed, there is a temple of Tolleshwar. Attached to that temple there is a small *dharmsala*. There is also a well near the *dharmsala*, and that well is the only convenient source of water supply to the neighbourhood. At the relevant time the water in it was upto a depth of six feet. In the year 1957 the appellant wrote a letter to the trustee of the temple asking his permission to take water from that well for supplying it to the Government staff. The idea was to set up a pump in the well and lay out a pipeline leading up to the staff quarters. In reply to the letter Mr. Gole, who was the trustee, wrote that if this was done the water in the well will run out in a short time. He, therefore, suggested that the well be deepened and added: "However, the trustees have no objection to the Government's intention of laying out a pipeline from the well provided arrangements are made for supply of water to the temple and the small *dharmsala* nearby". It is not clear whether a pump was set up by the Government and a pipeline laid out. But it is an admitted fact that the well has not been deepened. It is also admitted that the contractor used the well water for carrying on his work without obtaining any express permission of the trustee and by the time he finished the work the water level had gone down to a little below two feet.

According to the complainant in February, 1957 the appellant had paid a visit to Tolleshwar and during his visit he told the complainant "to behave like other contractors" evidently suggesting that he should also pay him certain percentage of his bills as a bribe. It is sufficient to say that both the Courts have found that the appellant did not visit Tolleshwar in February, 1957 but the High Court has held that the appellant did make a demand for bribe in June, 1957 when he visited Tolleshwar and that the complainant has made a mistake regarding the date on which the bribe was demanded. On 26th March, 1957 one Bhatia was posted as Overseer there and though on 30th March, 1957, a cheque for Rs. 7,278 odd was given to the complainant on his first running bill, Bhatia made a complaint to the appellant on 2nd April, 1957 that the complainant was not carrying on his work satisfactorily and was not affording facilities to him for supervising the work. On 6th April, 1957 an Assistant Engineer attached to the appellant's charge inspected the work and found faults with it. On 7th April, 1957, the complainant and some of the workmen assaulted Bhatia about which the latter made a complaint in writing to the appellant. This complaint was eventually forwarded to the higher authorities who reprimanded the complainant and required him to give an undertaking to behave properly. On 9th April, 1957 the appellant wrote to Bhatia asking him to give instructions in writing to the complainant instead of giving mere oral instructions. He likewise wrote to the complainant asking him to carry on the work according to the instructions of Bhatia and also undertake not to use force. On 13th May, 1957 the appellant reported to the Director-General of Lighthouses that the complainant's work was bad and not according to specifications. He, therefore, suggested that the complainant should be required to pull down the constructions which were not according to the specifications. The complainant protested against this. On 28th May, 1957 he presented a second running bill for Rs. 38,000 odd and though apparently a cheque was prepared it was not handed over to the complainant as the work was defective. On 1st August, 1957 the Director-General of Lighthouses instructed the appellant not to make any payment to the complainant. It would appear that after some correspondence between the complainant and the higher authorities he eventually pulled down the structures which were not according to the specifications and re-constructed them and was paid Rs. 27,569 odd. That was on 6th February, 1958. It may be mentioned that this payment was made after the appellant visited the site on 10th January, 1958.

and made a favourable report to the Director-General of Lighthouses. Mr. A. S. R. Chari for the appellant points out that it is not suggested that even at this time the appellant asked for any bribe. Further payments of Rs. 35,000 odd, Rs. 7,000 odd, Rs. 21,000 odd, Rs. 6,200 odd, Rs. 9,190 odd, Rs. 18,900 odd were made between 18th March, 1958 and 9th February, 1959 and Mr. Chari again points out that there is no suggestion that any illegal gratification was demanded by the appellant before passing any of these bills. In the meanwhile reports that the work being done was unsatisfactory used to be made from time to time by the Overseer to the Appellant.

According to the prosecution when the appellant visited the site on 5th January, 1959 during the absence of the complainant he asked the complainant's brother-in-law Jaikishan, who was in charge of the work for Rs. 300 to Rs. 400. Jaikishan, however, did not pay the money on the pretext that he had no funds with him. This story, it may be mentioned, was not believed by the Special Judge and no reference to it has been made in the Judgment of the High Court.

At about that time the appellant was asked to level the ground adjoining the staff quarters and also deepen the well. This was extra work and the complainant declined to do it. It is said that he was also asked to repair the temple and *dharma-sala* and he refused to do that work also. On 9th February, 1959 the complainant presented his ninth running bill which was for Rs. 22,000 odd. On 13th March, 1959 the appellant visited Tolleshwar. During this visit he received a letter from D. S. Apte, D.W. 2 who used to look after the temple. In that letter he brought to the notice of the appellant that the temple was 400 years old, that small and petty repairs to the temple had become necessary, that it was also necessary to paint the temple both from inside and outside as also to provide a water tap in the temple and construct a road connecting the temple with the lighthouse. He, therefore, requested the appellant to consider these requirements sympathetically. According to the appellant, it is in pursuance of this request that he suggested to the complainant to do some work free for the temple. It may be mentioned that the complainant had actually taken up his residence in the *dharma-sala* attached to the temple and had used the main temple hall for some time for storing his cement bags. Thus in addition to using the water from the temple well he had made ample use of the temple properties. According to Mr. Chari it was apparently for this reason that the appellant made the aforementioned suggestion to the complainant. It is an admitted fact that though the cheque for payment of Rs. 22,000 odd for the ninth running bill was prepared on 23rd March, 1959 it was not handed over to the complainant on that date. It is the complainant's case that the appellant was demanding 10 per cent. of the bills by way of illegal gratification, that upon the complainant refusing to pay that amount the appellant brought down the demand to 3 or 4 per cent. and ultimately to Rs. 1,000. The prosecution case is that it is for compelling the complainant to *disgorge* this amount that the cheque was being withheld. According to the appellant he refused to certify completion of the work unless the complainant undertook to level the ground and deepen the well and for no other reason. He admitted that this was extra work but he said that the complainant was required under the contract to do the extra work, though of course he would have been entitled to separate payment with respect to it. It was for this reason alone that he had asked the complainant to see him in Bombay on 26th March, 1959. The appellant on being informed of this, wrote to the appellant's office on 27th March, 1959 saying that the cheque should not be sent by post but should be handed over to him personally when he visited Bombay. On 28th March, 1959 this postcard was brought to the notice of the appellant. He was going on a short leave and, therefore, he made an endorsement on that postcard that the complainant should be asked to see him on 6th April, 1959 by which time he would be back on duty and that the complainant would be given the cheque on that day. On 31st March, 1959, the appellant learnt that a cheque for Rs. 32,200 odd on account of the tenth running bill had been prepared and he, therefore, asked for payment of that bill also but the officer-in-charge did not hand over either of the cheques

to him. Thereafter the complainant went to the anti-corruption department and lodged a complaint.

On 6th April, 1959 the complainant went to the office of the appellant and saw him in his cabin. There the cheque was handed over by the appellant to the complainant. But before that, according to the complainant, he paid Rs. 1,000 in currency notes to the appellant. Having done that he came out and then certain police officials accompanied by *panchas* entered the room. On being required to produce the money by the police officials the appellant promptly took out the currency notes from his pocket. It may be mentioned that the currency notes were *bismear*ed with anthracene powder and it is common ground that traces of anthracene powder were found not only on the pocket of the appellant but also on his fingers and those of the complainant. The currency notes were on examination also found to show traces of anthracene. It may be mentioned that the cheque was not subjected to the usual test. The appellant's explanation is that after he handed over the cheque to the complainant the latter said that he was really not in a position to do the repair work, etc., to the temple and *dharmasala* because he did not have enough men even for doing the work which was undertaken by him and that he was therefore handing over to the appellant Rs. 1,000 for being transmitted to the temple authorities. His grievance is that by not subjecting the cheque to the usual test he has been deprived of the opportunity of establishing his defence that the cheque was handed over by him to the complainant even before he received the money. It does not appear, however, that any grievance was made of this fact before the Special Judge who tried the case.

Thus the receipt of Rs. 1,000 was admitted by the appellant. This was admittedly not the appellant's 'legal remuneration'. The first question, therefore, is whether a presumption under sub-section (1) of section 4 of the Prevention of Corruption Act arises in this case. That provision runs thus :

"Where in any trial of an offence punishable under section 161 or section 165 of the Indian Penal Code it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any, other person any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

It was contended that the use of the word 'gratification' in sub-section (1) of section 4 emphasises that the mere receipt of any money does not justify the raising of a presumption thereunder and that something more than the mere receipt of money has to be proved. A similar argument was raised before this Court in *G. I. Emden v. State of Uttar Pradesh*¹. Dealing with it this Court has pointed out that what the prosecution has to prove is that the accused person has received "gratification other than legal remuneration" and that when it is shown that he has received a certain sum of money which was not a legal remuneration, then the condition prescribed by this section is satisfied. This Court then proceeded to observe :

"If the word 'gratification' is construed to mean money paid by way of a bribe then it would be futile or superfluous to prescribe for the raising of the presumption. Technically it may no doubt be suggested that the object which the statutory presumption serves on this construction is that the Court may then presume that the money was paid by way of a bribe as a motive or reward as required by section 161 of the Code. In our opinion this could not have been the intention of the Legislature in prescribing the statutory presumption under section 4 (1)."

This Court further said that there is yet another consideration which supports the construction placed by it. In this connection a reference was made to section 165 of the Code and it was observed :

"It cannot be suggested that the relevant clause in section 4 (1) which deals with the acceptance of any valuable thing should be interpreted to impose upon the prosecution an obligation to prove not only that the valuable thing has been received by the accused but that it has been received by him without consideration or for a consideration which he knows to be inadequate. The plain mean-

1. (1960) S.C.J. 368 : (1960) M.L.J. (Cr.) 228 : A.I.R. (1960) S.C. 548.

ing of this clause undoubtedly requires the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more. If that is the true position in respect of the construction of this part of section 4 (1) it would be unreasonable to hold that the word 'gratification' in the same clause imports the necessity to prove not only the payment of money but the incriminating character of the said payment. It is true that the Legislature might have used the word 'money' or 'consideration' as has been done by the relevant section of the English statute ;"

That being the legal position it must be held that the requirements of sub-section (1) of section 4 have been fulfilled in the present case and the presumption thereunder must be raised.

The next contention of Mr. Chari is that the accused person is entitled to rebut the presumption arising against him by virtue of a statutory provision by offering an explanation which is reasonable and probable. According to him the complainant evidently nursed a grievance against the appellant because the latter used to find fault with his work that the complainant was required to demolish some construction and do the work over again. He further points out that the complainant also felt aggrieved because of the appellant's insistence on the complainant doing the work of levelling the ground adjoining the staff quarters and deepening the temple well, even though he would have been paid separately for this work. It is because of these circumstances that, according to Mr. Chari, the complainant conceived the idea of laying a trap for involving the appellant. He points out that apart from the bare statement of the complainant there is nothing to show that the appellant had been asking for any bribes. No doubt the appellant had suggested that some work for the temple should be done free by the complainant. But that was merely by way of request and nothing more and there is nothing to show that he was using his official position to coerce the complainant for doing this work. He has taken us through considerable portions of the evidence on record to show that the complainant was not the kind of man who could be easily cowed down and it is unthinkable that the appellant would have tried to use pressure tactics against the complainant either for doing some work for the temple or for obtaining illegal gratification for himself. And in this connection he referred in particular to a reply sent by the complainant to the Director-General of Light Houses. Then he points out that it has not been established that though bills worth a lakh of rupees or so were already passed for payment by the appellant, he had used any pressure for obtaining bribe. It would therefore, not be reasonable to hold that the appellant had withheld the ninth bill just for coercing the complainant to pay a thousand rupees to him by way of illegal gratification. He then pointed out that actually on 19th March, 1959, the appellant had applied to the Director-General of Light Houses for permission to retire as from 30th June, and requested him to settle his gratuity amount. In these circumstances and knowing full well the kind of person the complainant was, would the appellant, says Mr. Chari, have been foolish enough to press him for a comparatively trivial amount of Rs. 1,000 by way of bribe? He, therefore, urges that in the circumstances the explanation offered by the appellant which is to the effect that the complainant voluntarily paid to him a sum of Rs. 1,000 on 6th April, 1959, for being passed on to the temple authorities should be accepted as reasonable and probable. His grievance is that the High Court has misstated and misapplied the law when it observed in its judgment :

"The usual standard of an explanation given by the accused which may reasonably be true, though the Court does not accept it to be true, cannot be enough to discharge the burden. It is not necessary to consider what evidence would satisfy the words 'until the contrary is proved' in this case. The least that can be said is that the Court must be satisfied from the material placed before it on behalf of the accused either from the evidence for the prosecution or for the accused that it creates a reasonable doubt about the prosecution case itself. It is not necessary to go beyond this in this case since we are satisfied that the circumstances and the evidence placed before us do not create a reasonable doubt about the prosecution case."

Mr. Chari contends that upon the view taken by the High Court it would mean that an accused person is required to discharge more or less the same burden for proving his innocence which the prosecution has to discharge for proving the guilt of

an accused person. He referred us to the decision in *Otto Georg Gfeller v. The King*¹ and contended that whether a presumption arises from the common course of human affairs or from a statute there is no difference as to the manner in which that presumption could be rebutted. In the decision referred to above the Privy Council, when dealing with a case from Nigeria, held that if an explanation was given which the jury think might reasonably be true and which is consistent with innocence, although they were not convinced of its truth, the accused person would be entitled to acquittal inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. That, however, was a case where the question before the jury was whether a presumption of the kind which in India may be raised under section 114 of the Evidence Act could be raised from the fact of possession of goods recently stolen, that the possessor of the goods was either a thief or receiver of stolen property. In the case before us, however, the presumption arises not under section 114 of the Evidence Act but under section 4 (1) of the Prevention of Corruption Act. It is well to bear in mind that whereas under section 114 of the Evidence Act it is open to the Court to draw or not to draw a presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the Court to draw such presumption, under sub-section (1) of section 4, however, if a certain fact is proved, that is, where any gratification (other than legal gratification) or any valuable thing is proved to have been received by an accused person the Court is required to draw a presumption that the person received that thing as a motive or reward such as is mentioned in section 161, Indian Penal Code. Therefore, the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to that person to show that though that money was not due to him as legal remuneration it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

How the burden which has shifted to the accused under section 4 (1) of the Prevention of Corruption Act is to be discharged has been considered by this Court in *State of Madras v. A. Vaidanatha Iyer*² where it has been observed :

"Therefore, where it is proved that a gratification has been accepted, then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It may here be mentioned that the Legislature has chosen to use the words 'shall presume' and not 'may presume', the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but section 4 of the Prevention of Corruption Act is *in pari materia* with the Evidence Act because it deals with a branch of law of evidence, i.e., presumptions, and, therefore should have the same meaning. 'Shall presume' has been defined in the Evidence Act as follows :

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under section 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumptions of law constitute a branch of jurisprudence."

1. A.I.R. 1943 P.C. 211.

2. (1958) S.C.J. 335 : (1958) M.L.J. (CrL)

299 : (1958) 1 An. W.R. (S.C.) 136 : (1958) 1 M.L.J. (S.C.) 136 : A.I.R. 1958 S.C. 61.

These observations were made by this Court while dealing with an appeal against an order of the Madras High Court setting aside the conviction of an accused person under section 161, Indian Penal Code. In that case the accused, an Income-tax Officer, was alleged to have received a sum of Rs. 1,000 as bribe from an assessee whose case was pending before him. His defence was that he had taken that money by way of loan. The High Court found as a fact that the accused was in need of Rs. 1,000 and had asked the assessee for a loan of that amount. It was of opinion that the versions given by the assessee and the accused were balanced, that the bribe seemed to tilt the scale in favour of the accused and that the evidence was not sufficient to show that the explanation offered cannot reasonably be rejected. This Court reversed the High Court's decision holding that the approach of the High Court was wrong. The basis of the decision of this Court evidently was that a presumption of law cannot be successfully rebutted by merely raising a probability, however reasonable, that the actual fact is the reverse of the fact which is presumed. Something more than raising a reasonable probability is required for rebutting a presumption of law. The bare word of the appellant is not enough and it was necessary for him to show that upon the established practice his explanation was so probable that a prudent man ought, in the circumstances, to have accepted it. According to Mr. Chari here, there is some material in addition to the explanation offered by the appellant which will go to rebut the presumption raised under section 4 (1) of the Act. He points out that there is the letter from D. S. Apte addressed to the appellant, defence Ex. No. 32 collectively, which the appellant claims to have received on or after 13th March, 1959 during his visit to Tolleshwar. He says that this letter was produced by him immediately when the police official came to his cabin on 5th April, 1959 and recovered from him a sum of Rs. 1,000 which the complainant had paid to him. He points out that this letter was in the same pocket in which the money was kept and says that it is conclusive to disprove that the money was received by way of bribe. He also relies upon the evidence of D. S. Apte. That evidence, however, does not go further than the letter. No evidence was, however, brought to our notice to show that the appellant had at any time asked the complainant to give any money by way of donation to the temple and indeed there is evidence to the contrary to the effect that none of the persons interested in the temple had authorised the appellant to collect any money for meeting the expenses of repairs to the temple. It is because of these circumstances and because it believed the statement of the complainant that the appellant had asked him for a bribe that the High Court did not accept the appellant's explanation that the money was paid by the complainant to him for being passed on of the temple trustee as true. The High Court disbelieved the evidence of Apte and held the letter to be worthless. In doing so it cannot be said that the High Court has acted unreasonably. It would therefore not be appropriate for us to place our own assessment on these two pieces of evidence. Further the question whether a presumption of law or fact stands rebutted by the evidence or other material on record is one of fact and not of law and this Court is slow to interfere with the view of facts taken by the High Court. No doubt, it will be open to this Court to examine the evidence for itself where the High Court has proceeded upon an erroneous view as to the nature of the presumption or, again, where the assessment of facts made by the High Court is manifestly erroneous. The case before us does not suffer from either of these defects. In the circumstances we dismiss the appeal.

A plea was made before us that in view of the age of the appellant and the fact that he was just about to retire when the prosecution was started we should reduce the sentence to the period already undergone. These circumstances were borne in mind by the learned Special Judge when he passed a substantive sentence of imprisonment of one year only though the maximum for the offence is seven years. We do not think that there is room for further reduction of the sentence.

K.L.B.

Appeal dismissed.

rator to whom parties have voluntarily referred their disputes for arbitration is a Tribunal under Article 136.

Article 136 (1) provides that notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant Special Leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory or India. Sub-article (2) excludes from the scope of sub-article (1) any judgment, determination, sentence or order passed or made by any Court or Tribunal constituted by or under any law relating to the Armed Forces. It is clear that Article 136 (1) confers very wide powers on this Court and as such, its provisions have to be liberally construed. The Constitution-makers thought it necessary to clothe this Court with very wide powers to deal with all orders and adjudications made by Courts and Tribunals in the territory of India in order to ensure fair administration of justice in this country. It is significant that whereas Articles 133 (1) and 134 (1) provide or appeals to this Court against judgments, decrees or final orders passed by the High Courts, no such limitation is prescribed by Article 136 (1). All Courts and all Tribunals in the territory of India except those in clause (2) are subject to the appellate jurisdiction of this Court under Article 136 (1). It is also clear that whereas the appellate jurisdiction of this Court under Articles 133 (1) and 134 (1) can be invoked only against final orders, no such limitation is imposed by Article 136 (1). In other words, the appellate jurisdiction of this Court under this latter provision can be exercised even against an interlocutory order or decision. Causes or matters covered by Article 136 (1) are all causes and matters that are brought for adjudication before Courts or Tribunals. The sweep of this provision is thus very wide. It is true that in exercising its powers under this Article, this Court in its discretion refuses to entertain applications for Special Leave where it appears to the Court that interference with the orders sought to be appealed against may not be necessary in the interest of justice. But the limitations thus introduced, in practice, are the limitations imposed by the Court itself in its discretion. They are not prescribed by Article 136 (1).

For invoking Article 136 (1), two conditions must be satisfied. The proposed appeal must be from any judgment, decree, determination, sentence or order, that is to say, it must not be against a purely executive or administrative order. If the determination or order giving rise to the appeal is a judicial or quasi-judicial determination or order, the first condition is satisfied. The second condition imposed by the Article is that the said determination or order must have been made or passed by any Court or Tribunal in the territory of India. These conditions, therefore, require that the act complained against must have the character of a judicial or quasi-judicial act and the authority whose act is complained against must be a Court or a Tribunal. Unless both the conditions are satisfied, Article 136 (1) cannot be invoked.

The distinction between purely administrative or executive acts and judicial or quasi-judicial acts has been considered by this Court on several occasions. In the case of *Province of Bombay v. Kusaladas S. Advani and others*¹, Mahajan, J. observed that the question whether an act is a judicial or a quasi-judicial one or a purely executive act depends on the terms of the particular rules and the nature, scope and effect of the particular powers in exercise of which the act may be done and would, therefore, depend on the facts and circumstances of each case. Courts of law established by the State decide cases brought before them judicially and the decisions thus recorded by them fall obviously under the category of judicial decisions. Administrative or executive bodies, on the other hand, are often called upon to reach decisions in several matters in a purely administrative or executive manner and these decisions fall clearly under the category of administrative or executive orders. Even Judges have, in certain matters, to act administratively, while administrative or executive authorities may have to act quasi-judicially in dealing with some matters entrusted to their jurisdiction. Where an authority is required to act judicially either by an

express provision of the statute under which it acts or by necessary implication of the said statute, the decisions of such an authority generally amount to quasi-judicial decisions. Where, however, the executive or administrative bodies are not required to act judicially and are competent to deal with issues referred to them administratively, their conclusions cannot be treated as quasi-judicial conclusions. No doubt, even while acting administratively, the authorities must act *bona fide*; but that is different from saying that they must act judicially. Bearing in mind this broad distinction between acts or orders which are judicial or quasi-judicial on the one hand, and administrative or executive acts on the other, there is no difficulty in holding that the decisions of the arbitrators to whom industrial disputes are voluntarily referred under section 10-A of the Act are quasi-judicial decisions and they amount to a determination or order under Article 136 (1). This position is not seriously disputed before us. What is in dispute between the parties is not the character of the decisions against which the appeals have been filed, but it is the character of the authority which decided the disputes. The respondents contend that the arbitrators whose awards are challenged, are not Tribunals, whereas the appellants contend that they are.

Article 136 (1) refers to a Tribunal in contradistinction to a Court. The expression "a Court" in the technical sense is a Tribunal constituted by the State as a part of ordinary hierarchy of Courts which are invested with the State's inherent judicial powers. The Tribunal as distinguished from the Court, exercises judicial powers and decides matters brought before it judicially or quasi-judicially, but it does not constitute a Court in the technical sense. The Tribunal, according to the dictionary meaning, is a seat of justice; and in the discharge of its functions, it shares some of the characteristics of the Court. A domestic Tribunal appointed in departmental proceedings, for instance, or instituted by an industrial employer cannot claim to be a Tribunal under Article 136 (1). Purely administrative Tribunals are also outside the scope of the said Article. The Tribunals which are contemplated by Article 136 (1) are clothed with some of the powers of the Courts. They can compel witnesses to appear, they can administer oath, they are required to follow certain rules of procedure: the proceedings before them are required to comply with rules of natural justice, they may not be bound by the strict and technical rules of evidence, but, nevertheless, they must decide on evidence adduced before them; they may not be bound by other technical rules of law, but their decisions must, nevertheless, be consistent with the general principles of law. In other words, they have to act judicially and reach their decisions in an objective manner and they cannot proceed purely administratively or base their conclusions on subjective tests or inclinations. The procedural rules which regulate the proceedings before the Tribunals and the powers conferred on them in dealing with matters brought before them, are sometimes described as the 'trappings of a Court' and in determining the question as to whether a particular body or authority is a Tribunal or not, sometimes a rough and ready test is applied by enquiring whether the said body or authority is clothed with the trappings of a Court.

In *Shell Company of Australia, Ltd. v. Federal Commissioner of Taxation*¹, the Privy Council had to consider whether the Board of Review created by section 41 of the (Federal) Income Tax Assessment Act, 1922-25, to review the decisions of the Commissioner of Taxation, was a Court exercising the judicial power of the Commonwealth within the meaning of section 71 of the Constitution of Australia; and it was held that it was not a Court but was an administrative tribunal. Lord Sankey, L.C., examined the relevant provisions of the statute which created the said Board and came to the conclusion that the Board appeared to be in the nature of administrative machinery to which the tax-payer can resort at his option in order to have his contentions re-considered. He then added that an administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an *ad hoc* tribunal an exercise by a Court of judicial power (pages 297-298).

It is in this connection that Lord Sankey observed that the authorities are clear to show that there are tribunals with many of the trappings of a Court which nevertheless, are not Courts in the strict sense of exercising judicial power. In that connection, His Lordship enumerated some negative propositions. He observed that a Tribunal does not become a Court because it gives a final decision, or because it hears witnesses on oath, or because two or more contending parties appear before it between whom it has to decide, or because it gives decisions which affect the rights of subjects, or because there is an appeal to a Court, or because it is a body to which a matter is referred by another body (pages 296-297). These negative propositions indicate that the features to which they refer may constitute the trappings of a Court ; but the presence of the said trappings does not necessarily make the Tribunal a Court. It is in this context that the picturesque phrase 'the trappings of a Court' came to be used by the Privy Council.

This question was considered by this Court in *The Bharat Bank, Ltd., Delhi v. Employees of the Bharat Bank, Ltd., Delhi*¹. This decision is apposite for our purpose because the question which came to be determined was in regard to the character of the Industrial Tribunals constituted under the Act. The majority decision of this Court was that the functions and duties of the Industrial Tribunal are very much like those of a body discharging judicial functions and so, though the Tribunal is not a Court, it is nevertheless a Tribunal for the purposes of Article 136. In other words, the majority decision which, in a sense, was epoch-making, held that the appellate jurisdiction of this Court under Article 136 can be invoked in proper cases against awards and other orders made by Industrial Tribunals under the Act. In discussing the question as to character of the Industrial Tribunal functioning under the Act, Mahajan, J. observed that the condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the State; and he added that a Tribunal would be outside the ambit of Article 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties. In the opinion of the learned Judge, Tribunals which are found invested with certain functions of a Court of justice and have some of its trappings also would fall within the ambit of Article 136 and would be subject to the appellate control of this Court whenever it is found necessary to exercise that control in the interests of justice. It would thus be noticed that apart from the importance of the trappings of a Court, the basic and essential condition which makes an authority or a body a tribunal under Article 136, is that it should be constituted by the State and should be invested with the State's inherent judicial power. Since this test was satisfied by the Industrial Tribunals under the Act, according to the majority decision, it was held that the awards made by the Industrial Tribunals are subject to the appellate jurisdiction of this Court under Article 136.

In *Durga Shankar Mehta v. Thakur Raghuraj Singh and others*², Mukherjea, J., who delivered the unanimous opinion of the Court observed that it was well settled by the majority decision of this Court in the case of *Bharat Bank, Ltd.*¹ that the expression "Tribunal" as used in Article 136 does not mean the same thing as "Court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and invested with judicial as distinguished from purely administrative or executive functions. Thus, there can be no doubt that the test which has to be applied in determining the character of an adjudicating body is whether the said body has been invested by the State with its inherent judicial power. This test implies that the adjudicating body should be constituted by the State and should be invested with the State's judicial power which it is authorised to exercise. The same principle has been reiterated in *Harinagar Sugar Mills, Ltd. v. Shyam Sunder Jhunjhunwala and others*.³

It is now necessary to examine the scheme of the relevant provisions of the Act bearing on the voluntary reference to the arbitrator, the powers of the said arbitrator

1. (1950) S.C.R. 439.

2. (1954) S.C.J. 723 ; (1954) 2 M.L.J. 385 : 1669.
(1955) 1. S.C.R. 267.

3. (1962) 2 S.C.R. 339 ; A.I.R. 1961 S.C.

and the procedure which he is required to follow. Section 10-A under which voluntary reference has been made in both the cases was added to the Act by Act XXXVI of 1956. It reads as under :—

“10-A. (1) Where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred under section 10 to a Labour Court or Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration and the reference shall be to such person or persons (including the Presiding Officer of a Labour Court or Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified in the arbitration agreement.

(2) An arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

(3) A copy of the arbitration agreement shall be forwarded to the appropriate Government and the Conciliation Officer and the appropriate Government shall, within fourteen days from the date of the receipt of such copy, publish the same in the Official Gazette.

(4) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

(5) Nothing in the Arbitration Act, 1940 shall apply to arbitrations under this section.”

Consequent upon the addition of this section, several changes were made in the other provisions of the Act. Section 2 (b) which defines an award was amended by the addition of the words “it includes an arbitration award made under section 10-A”. In other words, as a result of the amendment of the definition of the word “award”, an arbitration award has now become an award for the purposes of the Act. The inclusion of the arbitration award within the meaning of section 2 (b) has led to the application of sections 17, 17-A, 18(2), 19 (3), 21, 29, 30, 33-C and 36-A to the arbitration award. Under section 17 (2), an arbitration award when published under section 17 (1), shall be final and shall not be called in question by any Court in any manner whatsoever. Section 17-A provides that the arbitration agreement shall become enforceable on the expiry of thirty days from the date of its publication under section 17, and under section 18 (2), it is binding on the parties to the agreement who referred the dispute to arbitration; under section 19 (3), it shall, subject to the provisions of section 19, remain in operation for a period of one year provided that the appropriate Government may reduce the said period and fix such other period as it thinks fit; provided further that the said period may also be extended as prescribed under the said proviso. The other sub-sections of section 19 would also apply to the arbitration award. Section 21 which requires certain matters to be kept confidential is applicable and so section 30 which provides for a penalty for the contravention of section 21, also applies. Section 29 which provides for penalty for breach of an award can be invoked in respect of an arbitration award. Section 33-C which provides for a speedy remedy for the recovery of money from an employer is applicable; and section 36-A can also be invoked for the interpretation of any provision of the arbitration award. In other words, since an arbitration award has been included in the definition of the word ‘Award’, these consequential changes have made the respective provisions of the Act applicable to an arbitration award.

On the other hand, there are certain provisions which do not apply to an arbitration award. Sections 23 and 24 which prohibit strikes and lock-outs, are inapplicable to the proceedings before the arbitrator to whom a reference is made under section 10-A, and that shows that the Act has treated the arbitration award and the prior proceedings in relation to it as standing on a different basis from an award and the prior proceedings before the Industrial Tribunals or Labour Courts. Section 20, which deals with the commencement and conclusion of proceeding, provides, *inter alia*, by sub-section (3) that proceedings before an arbitrator under section 10-A shall be deemed to have commenced on the date of the reference of the dispute for arbitration and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under section 17-A. It would be noticed that just as in the case of proceedings before the Industrial Tribunal commencement of the proceedings is marked by the reference under section 10, so the commencement of the proceedings before the arbitrator is marked by the reference made by the parties themselves, and that means the commencement of the proceedings takes place even

before the appropriate Government has entered on the scene and has taken any action in pursuance of the provisions of section 10-A.

Rules have been framed by the Central Government and some of the State Governments under section 38 (2) (aa), and these rules make provisions for the form of arbitration agreement, the place and time of hearing, the power of the arbitrator to take evidence, the manner in which the summons should be served, the powers of the arbitrator to proceed *ex parte*, if necessary, and the power to correct mistakes in the award and such other matters. Some of these Rules (as for instance, Central Rules, 7, 8, 13, 15, 16 and 18 to 28) seem to make a distinction between an arbitrator and the other authorities under the Act, whereas the Rules framed by some of the States (for instance the rules framed by the Madras State 31, 37, 38, 39, 40, 41 and 42) seem to treat the arbitrator on the same basis as the other appropriate authorities under the Act. That, shortly, stated, is the position of the relevant provisions of the statute and the Rules framed thereunder. It is in the light of these provisions that we must now consider the character of the arbitrator who enters upon arbitration proceedings as a result of the reference made to him under section 10-A.

The learned Solicitor-General contends that such an arbitrator is no more and no better than a private arbitrator, to whom a reference can be made by the parties under an arbitration agreement as defined by the Arbitration Act (X of 1940). He argues that such an arbitrator has to act judicially, has to follow a fair procedure, take evidence, hear the parties and come to his conclusion in the light of the evidence adduced before him; and that is all that the arbitrator to whom reference is made under section 10-A does. It may be that the arbitration award is created as an award for certain purposes under the Act; but the position, in law, still remains that it is an award made by an arbitrator appointed by the parties. Just as an award made by a private arbitrator becomes a decree subject to the provisions of sections 15, 16, 17 and 30 of the Arbitration Act, and thus binds the parties, so does an award of the arbitrator under section 10-A become binding on the parties by virtue of the relevant provisions of the Act. Against an award made by a private arbitrator, no writ can issue under Article 226; much less can an appeal lie under Article 136. The position with regard to the award made by an arbitrator under section 10-A is no different. In support of this argument, he has relied on the decision in *R. v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians and others*¹. On a motion for an order of *certiorari* to quash an order made by the Disputes Committee, Lord Goddard, C.J., held that the Court has no power to direct the issue of orders of *certiorari* or of prohibition addressed to an arbitrator directing that a decision by him should be quashed or that he be prohibited from proceeding in an arbitration, unless he is acting under powers conferred by statute. "There is no instance of which I know in the books", observed Lord Goddard, "where *certiorari* or prohibition has gone to any arbitrator, except a statutory arbitrator, and a statutory arbitrator is a person to whom, by statute, the parties must resort." The Solicitor-General suggests that though some powers have been conferred on the arbitrator appointed under section 10-A, he cannot be treated as a statutory arbitrator, because the parties are not compelled to go to any person named as such by the statute. The arbitrator is an arbitrator of the parties' choice and so, he cannot be treated as a statutory arbitrator.

On the other hand, Mr. Pai has urged that it would be unreasonable to treat the present arbitrator as a private arbitrator, because section 10-A gives statutory recognition to the appointment of the arbitrator and the consequential changes made in the Act and the statutory Rules framed thereunder clearly show that he has been clothed with quasi-judicial powers and his proceedings are regulated by rules of procedure. Therefore, it would be appropriate to treat him as a statutory arbitrator and as such, a writ of *certiorari* would lie against his decision under Article 226. In support of this argument, Mr. Pai has referred us to the decision of the Court of

Appeal in *The King v. Electricity Commissioners Ex-parte London Electricity Joint Committee Co. (1920) Ltd., and others*¹. In that case, the scheme framed by the Electricity Commissioners established by section 1 of the Electricity (Supply) Act, 1919, was challenged and it was held that the impugned scheme was *ultra vires*, and so, a writ of prohibition was issued prohibiting the Commissioners from proceeding with the further consideration of the scheme. Dealing with the question as to whether a writ can issue against a body like the Electricity Commissioners constituted under the Act, Lord Atkin referred to the genesis and the history of the writs of prohibition and *certiorari* and held that the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs (page 205). Then Lord Atkin referred to a large number of previous decisions in which writs had been issued against different authorities statutorily entrusted with the discharge of different duties. To the same effect is the decision in the case of *R. v. Northumberland Compensation Appeal Tribunal Ex-parte Shaw*². *Vide* also Halsbury's Laws of England, Vol. 2, page 62 and Vol. 11, page 122.

The argument, therefore, is that against an award pronounced by an arbitrator appointed under section 10-A, a writ of *certiorari* would lie under Article 226, and so, the arbitrator should be deemed to be a Tribunal even for the purposes of Article 136. In our opinion, this argument is not well-founded. Article 226 under which a writ of *certiorari* can be issued in an appropriate case, is, in a sense, wider than Article 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of Courts or Tribunals. Under Article 226 (1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore even if the arbitrator appointed under section 10-A is not a Tribunal under Article 136 in a proper case, a writ may lie against his award under Article 226. That is why the argument that a writ may lie against an award made by such an arbitrator does not materially assist the appellants' case that the arbitrator in question is a tribunal under Article 136.

It may be conceded that having regard to several provisions contained in the Act and the Rules framed thereunder, an arbitrator appointed under section 10-A cannot be treated to be exactly similar to a private arbitrator to whom a dispute has been referred under an arbitration agreement under the Arbitration Act. The arbitrator under section 10-A is clothed with certain powers, his procedure is regulated by certain rules and the award pronounced by him is given by statutory provisions a certain validity and a binding character for a specified period. Having regard to these provisions, it may perhaps be possible to describe such an arbitrator, as in a loose sense, a statutory arbitrator and to that extent, the argument of the learned Solicitor-General may be rejected. But the fact that the arbitrator under section 10-A is not exactly in the same position as a private arbitrator, does not mean that he is a Tribunal under Article 136. Even if some of the trappings of a Court are present in his case, he lacks the basic, the essential and the fundamental requisite in that behalf because he is not invested with the State's inherent judicial power. As we will presently point out, he is appointed by the parties and the power to decide the dispute between the parties who appoint him is derived by him from the agreement of the parties and from no other source. The fact that his appointment once made by the parties is recognised by section 10-A and after his appointment he is clothed with certain powers and has thus, no doubt, some of the trappings of a Court, does not mean that the power of adjudication which he is exercising is derived from the State and so, the main test which this Court has evolved in determining the question about the character of an adjudicating body is not satisfied. He is not a Tri-

1. L.R. (1924) 1 K.B.D. 171.

2. (1951) 1 All.E.R. 268.

bunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties. His position, thus, may be said to be higher than that of a private arbitrator and lower than that of a Tribunal. A statutory Tribunal is appointed under the relevant provisions of a statute which also compulsorily refers to its adjudication certain classified classes of disputes. That is the essential feature of what is properly called statutory adjudication or arbitration. That is why we think the argument strenuously urged before us by Mr. Pai that a writ of *certiorari* can lie against his award is of no assistance to the appellants when they contend that such an arbitrator is a Tribunal under Article 136.

Realising this difficulty, Mr. Sule concentrated on the construction of section 10-A itself and urged that on a fair and reasonable construction of section 10-A, it should be held that the arbitrator cannot be distinguished from an Industrial Tribunal and is, therefore, a Tribunal under Article 136. In *The Bharat. Bark, Ltd. case*¹ it has been held that an Industrial Tribunal is a Tribunal under Article 136 and the arbitrator is no more and no less than an Industrial Tribunal; and so, the present appeals are competent, says Mr. Sule.

That takes us to the construction of section 10-A. Section 10-A enables the employer and the workmen to refer their dispute to arbitration by a written agreement before such a dispute has been referred to the Labour Court or Tribunal or National Tribunal under section 10. If an industrial dispute exists or is apprehended, the appropriate Government may refer it for adjudication under section 10; but before such a reference is made, it is open to the parties to agree to refer their dispute to the arbitration of a person of their choice and if they decide to adopt that course, they have to reduce their agreement to writing. When the parties reduce their agreement to writing, the reference shall be to such person as may be specified in the arbitration agreement. The section is not very happily worded; but the essential features of its scheme are not in doubt. If a reference has not been made under section 10, the parties can agree to refer their dispute to the arbitrator of their choice, the agreement is followed by writing, the writing specifies the arbitrator or arbitrators to whom the reference is to be made and the reference shall be made accordingly to such arbitrator or arbitrators. Mr. Sule contends—and it is no doubt an ingenious argument that the last clause of section 10-A means that after the written agreement is entered into by the parties, the reference shall be made to the person named by the agreement but it shall be made by the appropriate Government. In other words, the argument is that if the parties enter into a written agreement as to the person who should adjudicate upon their disputes, it is the Government that steps in and makes the reference to such named person. The arbitrator or arbitrators are initially named by the parties by consent, but it is when a reference is made to him or them by the appropriate Government that the arbitrator or arbitrators is or are clothed with the authority to adjudicate, and so, it is urged that the act of reference which is the act of the appropriate Government makes the arbitrator an Industrial Tribunal and he is thereby invested with the State's inherent judicial power.

We do not think that the section is capable of this construction. The last clause which says that the reference shall be to such person or persons, grammatically must mean that after the written agreement is entered into specifying the person or persons, the reference shall be to such person or persons. We do not think that on the words as they stand, it is possible to introduce the Government at any stage of the operation of section 10-A (1). The said provision deals with what the parties can do and provides that if the parties agree and reduce their agreement to writing, a reference shall be to the person or persons named by such writing. The fact that the parties can agree to refer their dispute to the Labour Court, Tribunal or National Tribunal in 10-A does no difference to the construction of the provision. Sub-section (2) prescribes the form of agreement and this Form also supports the same construction. This Form requires that the parties should state that they have agreed to refer the sub-

ing industrial dispute to the arbitration of the persons to be named in the Form. Then it is required that the matters in dispute should be specified and several other details indicated. The Form ends with the statement that the parties agree that the majority decision of the arbitrators shall be binding on them. This Form is to be signed by the respective parties and to be attested by two witnesses. In other words, there is no doubt that the Form prescribed by section 10-A (2) is exactly similar to the arbitration agreement, it refers to the dispute, it names the arbitrator and it binds the parties to abide by the majority decision of the arbitrators. Thus, it is clear that what section 10-A contemplates is carried out by prescribing an appropriate Form under section 10-A (2).

After the prescribed Form is thus duly signed by the parties and attested, under sub-section (3) a copy of it has to be forwarded to the appropriate Government and the Conciliation Officer and the appropriate Government has, within fourteen days from the date of the receipt of such copy, to publish the same in the Official Gazette. The publication of the copy is, in a sense, a ministerial act and the appropriate Government has no discretion in the matter. Sub-section (4) provides that the arbitrator shall investigate the dispute and submit his award to the appropriate Government ; and sub-section (5) excludes the application of the Arbitration Act to the arbitrations provided for by section 10-A. It is thus clear that when section 10-A (4) provides that the arbitrator shall investigate the dispute, it merely asks the arbitrator to exercise the powers which have been conferred on him by agreement of the parties under section 10-A (1). There is no doubt that the appropriate Government plays some part in these arbitration proceedings—it publishes the agreement ; it requires the arbitration award to be submitted to it ; then it publishes the award ; and in that sense, some of the features which characterise the proceedings before the Industrial Tribunal before an award is pronounced and which characterise the subsequent steps to be taken in respect of such an award, are common to the proceedings before the arbitrator and the award that he may make. But the similarity of these features cannot disguise the fact that the initial and the inherent power to adjudicate upon the dispute is derived by the arbitrator from the parties' agreement, whereas it is derived by the Industrial Tribunal from the statutory provisions themselves. In this connection, the provisions of section 10 (2) may be taken into consideration. This clause deals with a case where the parties to an industrial dispute apply in the prescribed manner for a reference of their dispute to an appropriate authority, and it provides that the appropriate Government, if satisfied that the persons applying represent the majority of each party, shall make the reference accordingly. In other words, if the parties agree that a dispute pending between them should be referred for adjudication, they move the appropriate Government, and the appropriate Government is bound to take the reference accordingly. Unlike cases falling under section 10 (1) where in the absence of an agreement between the parties it is in the discretion of the appropriate Government to refer or not to refer any industrial dispute for adjudication, under section 10 (2) if there is an agreement between the parties, the appropriate Government has to refer the dispute for adjudication. But the significant fact is that the reference has to be made by the appropriate Government and not by the parties, whereas under section 10-A the reference is by the parties to the arbitrator named by them and it is after the parties have named the arbitrator and entered into a written agreement in that behalf that the appropriate Government steps in to assist the further proceedings before the named arbitrator.

Section 18 (2) is also helpful in this matter. It provides that an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration. It would be noticed that this provision mentions the parties to the agreement as the parties who have referred the dispute to arbitration and that indicates that the act of reference is not the act of the appropriate Government, but the act of the parties themselves.

Section 10-A (5) may also be considered in this connection. If the reference to arbitration under section 10-A (1) had been made by the appropriate Government then the Legislature could have easily used appropriate language in that behalf

assimilating the arbitrator to the position of an Industrial Tribunal and in that case, it would not have been necessary to provide that the Arbitration Act will not apply to arbitrations under this section. The provisions of section 10-A (5) suggest that the proceedings contemplated by section 10-A are arbitration proceedings to which, but for sub-section (5), the Arbitration Act would have applied.

On behalf of the appellants, reliance has been placed on a recent decision of the Bombay High Court in the case of the *Air Corporations Employees' Union v. D. V. Vyas*.¹ In that case, the Bombay High Court has held that an arbitrator functioning under section 10-A is subject to the judicial superintendence of the High Court under Article 227 of the Constitution and, therefore, the High Court can entertain an application for a writ of *certiorari* in respect of the orders passed by the arbitrator. It was no doubt urged before the High Court that the arbitrator in question was not amenable to the jurisdiction of the High Court under Article 227 because he was a private and not a statutory arbitrator; but the Court rejected the said contention and held that the proceedings before the arbitrator appointed under section 10-A had all the essential attributes of a statutory arbitration under section 10 of the Act. From the judgment, it does not appear that the question about the construction of section 10-A was argued before the High Court or its attention was drawn to the obvious differences between the provisions of section 10-A and section 10. Besides, the attention of the High Court was apparently not drawn to the tests laid down by this Court in dealing with the question as to when an adjudicating body or authority can be deemed to be a Tribunal under Article 136. Like Article 136, Article 227 also refers to Courts and Tribunals and what we have said about the character of the arbitrator appointed under section 10-A by reference to the requirements of Article 136 may *prima facie* apply to the requirements of Article 227. That, however, is a matter with which we are not directly concerned in the present appeals.

Mr. Sule made a strong plea before us that if the arbitrator appointed under section 10-A was not treated as a Tribunal, it would lead to unreasonable consequences. He emphasised that the policy of the Legislature in enacting section 10-A was to encourage industrial employers and employees to avoid bitterness by referring their disputes voluntarily to the arbitrators of their own choice, but this laudable object would be defeated if it is realised by the parties that once reference is made under section 10-A the proceedings before the arbitrator are not subject to the scrutiny of this Court under Article 136. It is extremely anomalous, says Mr. Sule, that parties aggrieved by an award made by such an arbitrator should be denied the protection of the relevant provisions of the Arbitration Act as well as the protection of the appellate jurisdiction of this Court under Article 136. There is some force in this contention. It appears that in enacting section 10-A the Legislature probably did not realise that the position of an arbitrator contemplated therein would become anomalous in view of the fact that he was not assimilated to the status of an Industrial Tribunal and was taken out of the provisions of the Indian Arbitration Act. That, however, is a matter for the Legislature to consider.

In the result, the preliminary objection raised by the respondents in the appeals before us must be upheld and the appeals dismissed on the ground that they are incompetent under Article 136. The appellants to pay the costs of the respondents in C.A. No. 204 of 1962. No order as to costs in C.A. Nos. 182 and 183 of 1962.

V.S.

*Preliminary Objection upheld
and Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Udit Narain Singh Malpaharia

.. Appellant *

v.

Additional Member, Board of Revenue, Bihar and another .. Respondents.

Constitution of India (1950), Article 226—Application for a writ of certiorari—Necessary and proper parties—Who are.

In a writ of *certiorari* not only the Tribunal or authority whose order is sought to be quashed, but also parties in whose favour the said order is issued are necessary parties. It would be against all principles of natural justice to make an order adverse to those not impleaded in the writ application as any order so made could not be an effective one.

A necessary party is one without whom no order can be made effectively ; a proper party is one in whose absence an effective order can be made, but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

Appeal by Special Leave from the Order, dated the 3rd July, 1962 of the Patna High Court in Miscellaneous Judicial Case No. 460 of 1962.

H. N. Sanyal, Additional Solicitor-General of India, (*Jagat Narain Prasad Sinha* and *U. P. Singh*, Advocates, with him), for Appellant.

D. P. Singh, *M. K. Ramamurthi*, *R. K. Garg* and *S. C. Aggarwala*, Advocates of *M/s. Ramamurthi & Co.*, for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is directed against the order of the High Court of Judicature at Patna rejecting *in limine* an application for a writ of *certiorari* filed under Article 226 of the Constitution.

The facts giving rise to this appeal may be briefly stated. There is a country liquor shop in Dumka Town. Originally one Hari Prasad Sah was the licensee of that shop, but his licence was cancelled by the Excise Authorities. Thereupon a notice was issued inviting applications for the settlement of the shop. One Jadu Manjhi, along with others, applied for the licence. On 22nd March, 1961, for the settlement of the shop lots were drawn by the Deputy Commissioner, Santal Parganas, and the draw was in favour of Jadu Manjhi. But Hari Prasad Sah, that is the previous licensee, filed an appeal against the order of the Deputy Commissioner, before the Commissioner of the Santal Parganas and as it was dismissed, he moved the Board of Revenue, Bihar, and obtained a stay of the settlement of the said shop. On 13th July, 1961, the Board of Revenue dismissed the petition filed by Hari Prasad Sah. Meanwhile Jadu Manjhi died and when the fact was brought to the notice of the Deputy Commissioner, he decided to hold a fresh lot on 19th June, 1961, and the lot was drawn in favour of the appellant. Hari Prasad Sah filed a petition in the Revenue Court and obtained a stay of the settlement of the shop in favour of the appellant. Meanwhile one Basantilal Bhagat filed an application under Article 226 of the Constitution in the High Court at Patna and obtained an interim stay ; but he withdrew his application on 8th September, 1961. The petition filed by Hari Prasad Sah was dismissed by the Board of Revenue on 13th July, 1961. On 11th September, 1961, the appellant furnished security and the shop was settled on him and a licence was issued in his name. After the expiry of the period of the said licence, it was renewed in his favour for 1962. On 19th June, 1961, one Phudan Manjhi, son of Jadu Manjhi, filed a petition before the Deputy Commissioner for substituting his name in the place of his father on the basis of the lot drawn in favour of his father. The Deputy Commissioner rejected the application and Phudan Manjhi preferred an appeal against that order to the Commissioner of Excise ; and the Commissioner remanded the case to the Deputy Commissioner to consider the

fitness of Phudan Manjhi to get the licence and to consider whether the provisions of rule 145 of the Excise Manual, Volume II, would apply to the facts of his case. One Bhagwan Rajak, who was not an applicant before the Deputy Commissioner, filed an application before the Commissioner alleging that there should have been a fresh advertisement for the settlement of the shop according to clause 13 of rule 101 of the Excise Manual, Volume III; and on 13th March, 1962, the Commissioner allowed his application and directed the Deputy Commissioner to take steps for a fresh settlement of the shop in accordance with rules. Against the said orders the appellant filed petitions before the Board of Revenue and the said Board, by its order dated 30th May, 1962, dismissed the petitions and directed that unless the Deputy Commissioner came to a definite conclusion that Phudan Manjhi was unfit to hold the licence, he should be selected as a licensee in accordance with rule 145 of the Excise Manual, Volume II. The result of the said proceedings is that the appellant's licence was cancelled and the Deputy Commissioner was directed to hold a fresh settlement giving a preferential treatment to Phudan Manjhi. The appellant filed a petition under Article 226 of the Constitution in the High Court at Patna to quash the said orders. Neither Phudan Manjhi nor Bhagwan Rajak in whose favour the Board of Revenue decided the petition, was made a party. It is represented to us that pursuant to the orders of the Board of Revenue the Deputy Commissioner made an enquiry, came to the conclusion that Phudan Manjhi was not fit to be selected for the grant of a licence, and that he has not yet made a fresh settlement in view of the pendency of the present appeal.

Learned Additional Solicitor-General, appearing for the appellant, contended that the Board of Revenue acted without jurisdiction in directing a fresh settlement, as neither rule 101 nor rule 145 of the Excise Manual would apply to the facts of the case: rule 101 does not apply as in this case no licence was cancelled for malpractices, and rule 145 is not attracted as Phudan Manjhi was not a licensee since no licence was issued in his favour.

Learned counsel for the respondents raised a preliminary objection that, as Phudan Manjhi and Bhagwan Rajak, who were necessary parties to the writ petition, were not made parties, the High Court was fully justified in dismissing the petition *in limine*.

As we are accepting the preliminary objection raised on behalf of the respondents, we do not propose to express our view on the merits of the case. It may be mentioned that the order of the High Court does not disclose whether the petition was dismissed as the necessary parties were not before it, or on merits; but that does not preclude us from considering the question now raised, as the respondents had obviously no opportunity to raise that question in the High Court, notice having not been issued to them.

The question is whether in a writ in the nature of *certiorari* filed under Article 226 of the Constitution the party or parties in whose favour a tribunal or authority had made an order, which is sought to be quashed, is or are necessary party or parties. While learned Additional Solicitor-General contends that in such a writ the said tribunal or authority is the only necessary party and the parties in whose favour the said tribunal or authority made an order or created rights are not necessary parties but may at best be only proper parties and that it is open to this Court even at this very late stage, to direct the impleading of the said parties for a final adjudication of the controversy, learned counsel for the respondents contends that whether or not the authority concerned is a necessary party, the said parties would certainly be necessary parties, for otherwise the High Court would be deciding a case behind the back of the parties that would be affected by its decision.

To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled; it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

The next question is, what is the nature of a writ of *certiorari*? What relief can a petitioner in such a writ obtain from the Court? *Certiorari* lies to remove for the purpose of quashing the proceedings of inferior Courts of record or other persons or bodies exercising judicial or quasi-judicial functions. It is not necessary for the purpose of this appeal to notice the distinction between a writ of *certiorari* and a writ in the nature of *certiorari*: in either case the High Court directs an inferior tribunal or authority to transmit to itself the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. It is well-settled law that a *certiorari* lies only in respect of a judicial or quasi-judicial act as distinguished from administrative act. The following classic test laid down by Lord Justice Atkin, as he then was, in *The King v. The Electricity Commissioners*¹, and followed by this Court in more than one decision clearly brings out the meaning of the concept of judicial act:

"Wherever any body of a persons having legal authority to determine questions affecting the rights of subject, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs."

Lord Justice Slesser in *The King v. London County Council*², dissected the concept of judicial act laid down by Atkin, L.J., into the following heads in his judgment:

"wherever any body of persons (1) having legal authority, (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially, (4) acts in excess of their legal authority—a writ of *certiorari* may issue."

It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A tribunal, therefore, exercising a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of *certiorari* will be granted to remove the record of proceedings of an inferior tribunal or authority exercising judicial or quasi-judicial acts, *ex hypothesi* it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it. It is implicit in such a proceedings that a tribunal or authority which is directed to transmit the records must be a party in the writ proceedings, for, without giving notice to it, the record of proceedings cannot be brought to the High Court. It is said that in an appeal against the decree of a subordinate Court, the Court that passed the decree need not be made a party and on the same parity of reasoning it is contended that a tribunal need not also be made a party in a writ proceeding. But there is an essential distinction between an appeal against a decree of a subordinate Court and a writ of *certiorari* to quash the order of a tribunal or authority: in the former, the proceedings are regulated by the Code of Civil Procedure and the Court making the order is directly subordinate to the appellate Court and ordinarily acts within its bounds, though sometimes wrongly or even illegally, but in the case of the latter, a writ of *certiorari* is issued to quash the order of a tribunal which is ordinarily outside the appellate or revisional jurisdiction of the Court and the order is set aside on the ground that the tribunal or authority acted without or in excess of jurisdiction. If such a tribunal or authority is not made party to the writ, it can easily ignore the order of the High Court quashing its order, for, not being a party, it will not be liable to contempt. In these circumstances whoever else is a necessary party or not the authority or tribunal is certainly a necessary party to such a proceeding. In this case, the Board of Revenue and the Commissioner of Excise were rightly made parties in the writ petition.

The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a tribunal. As we have seen, a tribunal or authority performs a judicial or quasi-judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it. In a writ of *certiorari* the defeated party seeks for the quashing of the

1. L.R. (1924) 1 K.B. 171.

2. L.R. (1931) 2 K.B. 215, 243.

order issued by the tribunal in favour of the successful party. How can the High Court vacate the said order without the successful party being before it? Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the tribunal's order would be quashed but the right vested in that party by the wrong order of the tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of *certiorari* without making him a party or without impleading him subsequently, if allowed by the Court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a necessary party.

In addition, there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order, but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may *suo motu* approach the Court for being impleaded therein.

The long established English practice, which the High Courts in our country have adopted all along, accepts the said distinction between the necessary and the proper party in a writ of *certiorari*. The English practice is recorded in Halsbury's Laws of England, Volume 11, 3rd Edition (Lord Simonds') thus in paragraph 136 :

"The notice of motion or summons must be served on all persons directly affected, and where it relates to any proceedings in or before a Court, and the object is either to compel the Court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the notice of motion or summons must be served on the Clerk or Registrar of the Court, the other parties to the proceedings, and (where any objection to the conduct of the judge is to be made) on the Judge."

In paragraph 140 it is stated :

"On the hearing of the summons or motion for an order of mandamus, prohibition or *certiorari*, counsel in support begins and has a right of reply. Any person who desires to be heard in opposition, and appears to the Court or Judge to be a proper person to be heard, is to be heard notwithstanding that he has not been served with the notice or summons, and will be liable to costs in the discretion of the Court or Judge if the order should be made....."

So too, the Rules made by the Patna High Court require that a party against whom relief is sought should be named in the petition. The relevant Rules read thus.

Rule 3.—Application under Article 226 of the Constitution shall be registered as Miscellaneous Judicial Cases or Criminal Miscellaneous Cases, as the case may be.

Rule 4.—Every application shall, soon after it is registered, be posted for orders before a Division Bench as to issue of notice to the respondents. The Court may either direct notice to issue and pass such interim order as it may deem necessary or reject the application.

Rule 5.—The notice of the application shall be served on all persons directly affected and on such other persons as the Court may direct.

Both the English Rules and the Rules framed by the Patna High Court lay down that persons who are directly affected or against whom relief is sought should be named in the petition, that is, all necessary parties should be impleaded in the petition and notice served on them. In "The Law of Extraordinary Legal Remedies" by Ferris, the procedure in the matter of impleading parties is clearly described at page 201 thus :

"Those parties whose action is to be reviewed and who are interested therein and affected thereby, and in whose possession the record of such action remains, are not only proper, but necessary parties. It is to such parties that notice to show cause against the issuance of the writ must be given, and they are the only parties who may make return, or who may demur. The omission to make parties those officers whose proceedings it is sought to direct and control, goes to the very right of the relief sought. But in order that the Court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondent."

This passage indicates that both the authority whose order is sought to be quashed and the persons who are interested in maintaining the regularity of the proceeding of which a review is sought should be added as parties in a writ proceeding. A Division Bench of the Bombay High Court in *Ahmedalli v. M. D. Lalkaka*¹ laid down the procedure thus :

"I think we should lay down the rule of practice, that whenever a writ is sought challenging the order of a Tribunal, the Tribunal must always be a necessary party to the petition. It is difficult to understand how under any circumstances the Tribunal would not be a necessary party when the petitioner wants the order of the Tribunal to be quashed or to be called in question. It is equally clear that all parties affected by that order should also be necessary parties to the petition."

A Full Bench of the Nagpur High Court in *Kanglu Baula v. Chief Executive Officer*², held that though the elections to various electoral divisions were void the petition would have to be dismissed on the short ground that persons who were declared elected from the various constituencies were not joined as parties to the petition and had not been given an opportunity to be heard before the order adverse to them was passed. The said decisions also support the view we have expressed.

To summarise : in a writ of *certiorari* not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the Court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either *suo motu* or on the application of a party to the writ or an application filed at the instance of such proper party.

In the present case Phudan Manjhi and Bhagwan Rajak were parties before the Commissioner as well as before the Board of Revenue. They succeeded in the said proceedings and the orders of the said tribunal were in their favour. It would be against all principles of natural justice to make an order adverse to them behind their back ; and any order so made could not be an effective one. They were, therefore, necessary parties before the High Court. The record discloses that the appellant first impleaded them in his petition but struck them out at the time of the presentation of the petition. He did not file any application before the High Court for impleading them as respondents. In the circumstances, the petition filed by him was incompetent and was rightly rejected.

That order was made on 3rd July, 1962; and the Special Leave petition was filed on 18th July, 1962. Even in the Special Leave petition the said two parties were not impleaded. Learned counsel for the appellant suggests that this Court may at this very late stage direct them to be made parties and remand the matter to the High Court for disposal. This request is belated and cannot, therefore, be granted. In this view it is not necessary to express our opinion on the other questions raised.

The appeal fails and is dismissed with costs.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Chimandas Bagomal Sindhi

.. Appellant*

v.

Jogeshwar and another

.. Respondents.

Central Provinces and Berar Letting of Houses and Rent Control Order (1949), Clauses 23, 24 and 24-A—Construction and scope—Allotment of premises—Considerations.

It is wrong to assume that the provisions of clauses 23 (1), 24 and 24-A of the Central Provinces and Berar Letting of Houses and Rent Control Order (1949) postulate that the persons belonging to

1. A.I.R. 1954 Bom. 33, 34.

2. A.I.R. 1955 Nag. 49.

*C.A. No. 201 of 1960.

the respective categories specified by them can receive allotment only if they have no previous accommodation of their own. An application for allotment cannot be thrown out merely on the ground that the applicant had other accommodation by virtue of the fact that he was a partner in other concerns where he could do business. A person may be entitled to claim an allotment of premises on the ground that accommodation already available to him was patently insufficient or unsuitable. When such a plea is made the Deputy Commissioner may have to consider it and in doing so, he may have to examine the contentions raised by the landlord against such a plea as well as the claim that the landlord may make for his own personal occupation. Such enquiry would be quasi-judicial in nature and the power conferred on the Deputy Commissioner may have to be exercised in a fair and just manner. Claims for allotment cannot be ruled out on the preliminary ground that the very fact they have accommodation takes them out of the provisions of the respective clauses. The question about the propriety and validity of the allotment order must be judged in the light of the facts, as they obtained on that day and subsequent events like dissolution of partnership in which the applicant held a share cannot be taken into account.

Appeal by Special Leave from the Judgment and Order dated the 18th June, 1958 of the Bombay High Court, Nagpur in Miscellaneous Petition No. 391 of 1956.

M. C. Setalvad, Attorney-General, for India (*S. N. Andley* and *Rameshwar Nath*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Appellant.

S. N. Kherdekar, *N. K. Kherdekar* and *A. G. Ratnaparkhi*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal raises a short question about the construction of clauses 23, 24 and 24-A in the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter called the 'Order'). *Jogeshwar*, son of *Parmahand Bhishikar* (hereinafter called the respondent) owns a house known as the *Bhishikar Bhawan* in Nagpur. Block No. 2-A had been let out by him to a firm known as the *Dayalbagh Stores* for carrying on business. Since the tenant was in arrears as to rent, the respondent obtained from the Rent Control Authorities permission to terminate the said tenancy. Meanwhile, the tenant intimated to the respondent by telegram on 24th July, 1955 that it had vacated the said premises on that day. Prior to the receipt of this telegram, however, the appellant *Chimandas Bagomal Sindhi* had made an application to the Additional Deputy Commissioner, Nagpur, on 15th July, 1955, that the premises occupied by the said tenant were likely to fall vacant, and prayed that the same should be allotted to him as he was a displaced person within the meaning of the Order. The Additional Deputy Commissioner passed an order of provisional allotment in favour of the appellant on the same day, and since then, the appellant has been in possession of the said premises.

The respondent then came to know about the said provisional allotment and gave intimation to the Additional Deputy Commissioner that he needed the premises for his own purposes, and so, he moved for the cancellation of the said provisional allotment order. On 23rd July, 1956, the Additional Deputy Commissioner purporting to exercise his powers under clause 23 (1) of the Order confirmed the provisional allotment in favour of the appellant.

The respondent then moved the Nagpur High Court by a Writ Petition No. 307 of 1955 for cancellation of the said order. On 10th April, 1956, Mr. Justice Bhutt set aside the order of allotment and remanded the case for disposal in accordance with law. That is how the first stage of this dispute came to an end.

On remand, the Additional Deputy Commissioner confirmed the earlier order. He held that the respondent did not need the premises for his own occupation and he thought that there was no going back on the earlier provisional order of allotment in favour of the appellant. This second order was challenged by the respondent by another writ petition filed in the Nagpur High Court (No. 391 of 1956). Meanwhile, the appellant had filed a Letters Patent Appeal (No. 95 of 1956) against the decision of Bhutt, J., on the earlier writ petition filed by the respondent. By consent, the said Letters Patent Appeal and the subsequent writ petition filed by the respondent were heard together by a Division Bench of the High Court. The Division Bench has set aside the order of allotment passed in favour of the appellant.

and allowed the subsequent writ petition filed by the respondent. It is against this order that the appellant has come to this Court by Special Leave.

It appears that after remand, the respondent brought it to the notice of the Additional Deputy Commissioner that the appellant owned As. 4/- share in the Hind Vastra Bhandar and that he had, therefore, a place where he could carry on his business. This allegation was repeated by the respondent in his second writ petition and it was urged by him that in view of the fact that the appellant had a place of business of his own, he was not entitled to the accommodation allotted to him by the impugned order. This plea was met by the appellant on the ground that the business mentioned by the respondent had been dissolved. From the affidavit filed by the appellant in that behalf it does appear that the appellant had a share in the Hind Vastra Bhandar and Krishna Watch Co., both of which partnerships carried on their business at Nagpur, but on 8th April, 1957 the said partnerships had been dissolved and so, after the said date of dissolution there was no place of business to which the appellant could lay any claim. In support of this plea, the appellant has filed the deed of dissolution in question.

The High Court has held that reading the definition of the words 'displaced person' prescribed by clause 2 (2) together with the relevant clause of the Order under which the impugned allotment had been made in favour of the appellant, it must be held that the appellant was not a displaced person and as such, he was not entitled to the said allotment. That is how the main point which arises for our decision in the present appeal is about the construction of the said relevant clause, of the Order.

The order had been passed by the Government of the Central Provinces and Berar by virtue of the powers conferred on it by section 2 of the Central Provinces and Berar Act XI of 1946. Sub-clause (2) of clause 2 defines a displaced person as meaning any person who, on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or fear of such disturbance in any area now forming part of Pakistan, has been displaced from or has left his place of residence in such area after the 1st day of March, 1947, and who has subsequently been residing in India. The appellant claims to be such a displaced person.

Clause 13 provides, *inter alia*, that the landlord would be entitled to claim ejectment of this tenant if he shows that he needs the house or portion thereof for the purpose of his *bona fide* residence, provided he is not occupying any other residential house of his own in the city or town concerned. He can also obtain ejectment of his tenant if it is shown that the tenant has secured alternative accommodation or has left the area for a continuous period of four months and does not reasonably need the house.

Clauses 22 to 27 form part of Chapter III which deals with the collection of information and letting of accommodation. Clause 22 (1) provides that every landlord of a house situate in an area to which this Chapter applies, shall give intimation about the impending vacancy as specified by sub-clause (a) and (b). Clause 22 (2) lays down that no person shall occupy any house in respect of which this Chapter applies except under an order under sub-clause (1) of clause 23 or clause 24 or on an assurance from the landlord that the house is being permitted to be occupied in accordance with sub-clause (2) of clause 23. It would thus be noticed that all vacancies occurring in houses governed by Chapter III have to be filled in the manner specified by clause 22 (2).

Clause 23 (1) provides that on receipt of the intimation under clause 22, the Deputy Commissioner may within fifteen days from the date of receipt of the said intimation, order the landlord to let the vacant house to any person holding an office of profit under the Union or State Government or to any person holding a post under the Madhya Pradesh Electricity Board, or to a displaced person or to an evicted person and thereupon notwithstanding any agreement to the contrary, the landlord shall let the house to such person and place him in possession thereof immediately, it is vacant or as soon as it becomes vacant. The proviso to this sub-clause gives right to the landlord to plead that he needs the house for his own occupation, and if such a

plea is accepted by the Deputy Commissioner, the landlord would be allowed to occupy the same. In other words, in cases falling under clause 23 (1) before the Deputy Commissioner makes an order directing the landlord to let the house to one of the persons specified in the different categories by that clause, it would be open to the landlord to urge his own need and if that need is established, an order under clause 23 (1) would not be passed against him. Clause 23 (2) provides that if no order is passed and served upon the landlord within the period specified in sub-clause (1), he shall be free to let the vacant house to any person.

Clause 24 provides for the penalty for non-compliance with the requirements of clause 22 (1). Under this clause, the Deputy Commissioner is empowered to order the landlord to let the house forthwith to any of the persons falling under the categories specified by that clause. Since the power conferred on the Deputy Commissioner to make an order under this clause is intended, in a sense, to punish the landlord for his contravention of clause 22, it *prima facie* appears that the landlord is not given an opportunity to prove his own need as under the Proviso to clause 23 (1).

Clause 24-A deals with cases where the Deputy Commissioner receives information to the effect that a house is likely to become vacant or available for occupation by a particular date; and in such cases it empowers the Deputy Commissioner to make an order on the same lines as provided by clause 23 (1). This clause lays down that the order passed under it shall be complied with by the landlord unless the house does not become vacant or available for occupation within one month from the date of receipt by him of the said order, or the landlord applies for the cancellation of the said order stating his grounds thereof. This provision means that an order passed under clause 24-A can be challenged by the landlord by pleading that he needs the premises for himself. That, in brief, is the scheme of the relevant provisions.

The High Court has taken the view that in allotting the premises in question to the appellant, the Additional Deputy Commissioner has failed to notice the fact that on 15th July, 1955 when the provisional allotment order was passed, the appellant had a place of business of his own inasmuch as he was a 4 annas sharer in a partnership which had its place of business. According to the High Court as soon as it appeared that the appellant had a place of business of his own, he ceased to be a displaced person within the meaning of clause 23 (1) and the other relevant clauses. This conclusion proceeded on the basis that though the appellant may be taken to have satisfied the requirements of the definition of the expression "displaced person" under clause 2 (2), that definition had to be read in the light of the context of clause 23 (1) and its meaning had to be controlled by the said context. Clause 2 begins with the words that in this Order, unless there is anything repugnant in the subject or context, the defined terms will carry the meaning assigned to them by the respective definitions. The whole object of enabling the Deputy Commissioner to make an order of allotment in respect of the persons specified in different categories by the relevant clause, is to provide accommodation to those persons who were without any accommodation. Since that object is implicit assumption in the relevant provision, the definition must be construed in the light of the said implicit assumption of the relevant provision. It is on this view that the impugned order has been set aside by the High Court.

It may be conceded that *prima facie* the view taken by the High Court appears to be attractive. It does appear to be reasonable that provisions of the kind contained in Chapter III would normally be expected to assist persons of specified categories to obtain accommodation and that would impliedly postulate that such persons have no accommodation which they can claim their own. If the words of the relevant provision are ambiguous, or if their effect can reasonably be said to be a matter of doubt, it may be permissible to construe the said provisions in the light of the assumption made by the High Court. But, are the words of the relevant provision in any sense ambiguous, or is the effect of those words doubtful? In our opinion, the answer to these questions must be in the negative.

Clause 23 (1) refers to the persons in the specified categories, and empowers the Deputy Commissioner to make an order of allotment in their favour. There are no terms of limitation qualifying the said persons, and the scheme of the relevant provisions does not seem to contemplate any such limitation. It is significant that the said persons are not entitled as a matter of right to an order of allotment. What clause 23 (1) does is to confer power on the Deputy Commissioner to make an order of allotment if he thought it expedient, just or fair to do so in a particular case. It is only where an order is made by the Deputy Commissioner that an obligation is imposed on the landlord to let the premises to the person named in the order. Having regard to the words used in describing the persons and the categories, it seems plain that the provisions contemplated that a person belonging to one of those categories may be entitled to claim its benefit on the ground that accommodation already available to him was patently insufficient or unsuitable. When such a plea is made, the Deputy Commissioner may have to consider it and in doing so, he may have to examine the contentions raised by the landlord against such a plea as well as the claim that the landlord may make for his own personal occupation. The enquiry which would thus become necessary would be in the nature of a quasi-judicial enquiry and the power conferred on the Deputy Commissioner may have to be exercised in a fair and just manner. We do not think that clause 23 (1) as well as clauses 24 and 24-A necessarily exclude the cases of persons specified in them on the ground that the said persons already have an accommodation which they can call their own. Persons there specified would no doubt have a much better claim for accommodation if it is shown that they have no accommodation at all. But even if such persons have accommodation, their claims cannot be ruled out on the preliminary ground that the very fact that they have accommodation takes them out of the provisions of the respective clauses. It is quite true that if a person belonging to the specified categories has suitable and sufficient accommodation, he would normally not be entitled to claim the benefit of clause 23 (1). That, however, is a matter to be considered by the Deputy Commissioner on the merits. We are, therefore, satisfied that the High Court was in error in assuming that the provisions of clause 23 (1) and clauses 24 and 24-A impliedly postulate that the persons belonging to the respective categories specified by them can receive allotment only if they have no previous accommodation of their own. That being so, we must hold that the appellant's case cannot be thrown out merely on the ground that he had other accommodation by virtue of the fact that he was a partner in two concerns to which we have already referred.

This conclusion cannot, however, finally dispose of the appeal before us because it seems to us that after the remand order was passed by Mr. Justice Bhutt, the Additional Deputy Commissioner has not dealt with the matter in accordance with law as he was required to do. He appears to have taken the view that since a provisional order had already been passed, there was "no going back" upon it. He thought that after remand, the scope of the enquiry was confined to the examination of the question as to whether the respondent proved that he needed the premises for his own occupation. It is true that he has incidentally mentioned the fact that the appellant owned As. 4/- share in the business which was carried on in Nagpur, but he has added that the said fact does not preclude him from obtaining a shop for starting a business exclusively of his own. This observation shows that the Additional Deputy Commissioner did not properly appreciate the scope and effect of the provisions contained in the relevant clause. Besides, reading the order as a whole, it is quite clear that he took an unduly narrow view of the limits of the enquiry which he was bound to hold as a result of the remand order and that has vitiated his final conclusion. We, therefore, think that it is necessary that the matter should be sent back to the Additional Deputy Commissioner, Nagpur, with a direction that he should consider the case on the merits afresh. We wish to make it clear that the question as to whether the appellant should be given allotment of the premises in question should be determined by the Additional Deputy Commissioner in the light of the position as it stood on 15th July, 1955. We are making this observation because there has been some

controversy before us as to whether the appellant has lost his right in the premises belonging to the partnership of which admittedly he was a member by reason of the fact that the said partnership is alleged to have been dissolved on 8th April, 1947. The learned Attorney-General has contended that if the matter has to go back, the Additional Deputy Commissioner should be free to consider the subsequent events that have taken place, and the appellant's case should, therefore, be dealt with on the basis that he has no longer any shares in the said partnerships. We are not inclined to accept this contention. The fact that the present proceedings have been protracted would not entitle the appellant to ask the Additional Deputy Commissioner to take subsequent events into account. It is clear that the dissolution of the partnership took place long after the appellant obtained the provisional allotment from the Additional Deputy Commissioner and it is by no means clear that if the Additional Deputy Commissioner had been then told that the appellant had a place of business of his own, he would have granted accommodation to him in the present premises on the same day that he moved him in that behalf. We are satisfied that the question about the propriety and validity of the said provisional order must be judged in the light of the facts as they obtained on that day.

Mr. Kherdekar for the respondents wanted to argue before us that under clause 2 (2) the appellant was not a displaced person on that day and he has relied on the fact that the appellant had been carrying on business in several places in India since 1945. This point has not been considered either by the Additional Deputy Commissioner or the High Court. If so advised, the respondents may take this point before the Additional Deputy Commissioner and we have no doubt that if raised, it would be dealt with by the Additional Deputy Commissioner in accordance with law.

The result is, the appeal is allowed, the order passed by the High Court on the writ petition is set aside and the matter is remanded to the Additional Deputy Commissioner, Nagpur, with a direction that he should deal with the dispute between the parties afresh in accordance with law. Costs incurred by the parties so far would be costs in the final order which may be passed after remand.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Virupaxappa Veerappa Kadampur

*Appellant **

The State of Mysore

Respondent.

Bombay Police Act (XXII of 1951), section 161 (1)—Applicability—If 'limited to offences' under the Police Act and not applicable to offence under section 298 of Penal Code (XLV of 1860)—Acts done "under colour of duty"—Test—Offence.

The words 'under colour of duty' have been used in section 161 (1) of the Bombay Police Act to include acts done under the cloak of duty even though not by virtue of the duty. When the accused a Police Officer, prepares a false panchnama or a false report he is clearly using the existence of his legal duty as a cloak for his corrupt action or to use the words in Stroud's Dictionary "as a veil to his falsehood." The acts thus done in dereliction of his duty must be held to have been done "under colour of the duty."

The view that if the alleged act "is found to have been done in gross violation of the duty" then it ceased to be an act done under colour, is not correct. It is only when the act is in violation of the duty that the question of the act being done under colour of the duty arises. The fact that the act has been done under gross violation of the duty can be no reason to think that the act has not been done under colour of the duty.

The Legislature deliberately gave the protection of section 161 (1) of the Bombay Police Act to offences against any law and there is no justification for limiting that protection to offences under the Police Act only. Accordingly a prosecution against a Police Officer commenced after six months of the offence under section 218 of the Indian Penal Code is barred under section 161 (1) of the Bombay Police Act.

Appeal by Special Leave from the Judgment and Order, dated the 8th March, 1961, of the Mysore High Court in Criminal Appeal No. 362 of 1959.

Anil Kumar Gupta and *R. K. Garg*, Advocates, for Appellant.

R. Gopalakrishnan and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—The only question for decision in this appeal is whether the appellant's prosecution was barred by the special rule of limitation in section 161 (1) of the Bombay Police Act, 1951.

In February, 1954, the appellant was employed as a Head Constable at the Kalkeri Outpost attached to the Hippassagi Police Station. On 23rd February, 1954 the appellant went to Budhihal Road on receipt of information about the smuggling of Ganja from the then Hyderabad State to Kalkeri and at about 2 or 3 P.M. actually caught one Nabi Sab Kembhavi with a bundle containing 15 packets of Ganja. These 15 packets of Ganja were seized and for this seizure the appellant prepared a Panchnama in which however he incorrectly showed the seizure of 9 packets of Ganja only. On 24th February, 1954, it is alleged, the appellant had a new Panchnama prepared in which it was falsely recited that a person who was coming towards the village of Budhihal ran away on seeing the Panchas and the Havaldar, after throwing away a bundle and this bundle was found to contain 9 packets of Ganja weighing one tola each. The date in the Panchnama was mentioned as 23rd February, 1954. A report to the same effect was also prepared. The prosecution case is that no such thing happened on 24th February, 1954 or 23rd February, 1954, but that this Panchnama and the report were falsely prepared by the appellant with the dishonest intention of saving Nabi Sab Kembhavi who had actually been caught with Ganja from legal punishment.

On these allegations the appellant was tried by the Additional Sessions Judge Bijapur, on a charge under section 218 of the Indian Penal Code. He pleaded not guilty and contended that the Panchnama and the report which are challenged by the prosecution as a false Panchnama were correctly prepared by him on 23rd February, 1954, and mention the true state of affairs. It was also pleaded that rule 542 of the Bombay Police Manual barred his prosecution as prior permission of the District Superintendent of Police had not been taken. A further defence was raised that in any case as the prosecution was commenced long after six months had elapsed after the alleged commission of the offence it was barred by section 161 (1) of the Bombay Police Act.

The appellant was however convicted by the Trial Court under section 218 of the Indian Penal Code and sentenced to rigorous imprisonment for a period of one year.

Against that order, he appealed to the High Court of Mysore. The High Court agreed with the Trial Court that an offence under section 218 of the Indian Penal Code had been made out. The defence under rule 542 of the Bombay Police Manual was also rejected on the ground that this rule had no statutory force. As regards the plea of limitation under section 161 (1) of the Bombay Police Act, 1951 the High Court was of the opinion that on 24th February, 1954 the appellant had no duty to perform in regard to the crime detected on the 23rd and hence it was not possible to hold that the preparation of a false Panchnama and a false report "were acts done under colour or in excess of any such duty or authority as aforesaid" as found in section 161 (1) of the Bombay Police Act. Accordingly, the High Court dismissed the appeal.

Against that decision the present appeal has been preferred by Special Leave granted by this Court and the only question raised in the appeal is as regards the correctness of the High Court's conclusion that the prosecution of the appellant was not barred under section 161 (1) of the Bombay Police Act, 1951.

Section 161 (1) is in these words :—

"161. (1) In any case of alleged offence 'by the Revenue Commissioner, the Commissioner, a Magistrate, Police Officer or other person, or of a wrong alleged to have been done by such Revenue Commissioner, Commissioner, Magistrate, Police Officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted more than six months after the date of the act complained of."

In the present case, the prosecution was admittedly instituted much more than six months after the date of the act complained of. The allegation is that the offence was committed by a Police Officer. If, therefore, it appears that the offence alleged to have been committed "by any act done under colour or in excess of any such duty or authority as aforesaid" within the meaning of the above provision of law the prosecution was liable to be dismissed. From what has been said about the prosecution allegations it is clear that the offence is alleged to have been committed by the preparation of a false Panchnama and a false report on 24th February, 1954. The question that falls for decision therefore is whether the preparation of a Panchnama or a report was an "act done under colour or in excess of any such duty or authority as aforesaid." It is not disputed that the preparation of a correct Panchnama and a true report, as regards the seizure of the Ganja was the duty of the Police Officer. It is also manifest that such preparation was the duty of the Police Officer as laid down in the Bombay Police Act. For section 64 of the Act provides *inter alia* that it shall be the duty of every Police Officer

"to lay such information and to take such other steps consistent with law and with the orders of his superiors as shall be best calculated to bring offenders to justice"; (section 64 (b)). and also

"to discharge such duties as are imposed upon him by any law for the time being in force."

That the appellant was an Officer authorised under the Bombay Prohibition Act to seize the Ganja in the circumstances alleged is clear. In seizing it, he had necessarily to prepare a Panchnama, and to submit a report of the seizure.

In view of these provisions of law it has not been seriously disputed before us that the preparation of a correct Panchnama and a correct report as regards the seizure of Ganja was the duty of the appellant. This duty was, on the prosecution allegation, not performed. The act alleged to have been done, as already stated, was the preparation of a false Panchnama and a false report. The question still to be considered therefore is whether when the preparation of a correct Panchnama and a true report as regards the seizure is the duty of the police officer concerned, he prepares instead a false Panchnama and a false report, that act is done by him "under colour" or in excess of that duty.

The expression "under colour of something" or "under colour of duty", or "under colour of office", is not infrequently used in law as well as in common parlance. Thus in common parlance when a person is entrusted with the duty of collecting funds for, say, some charity and he uses that opportunity to get money for himself, we say of him that he is collecting money for himself under colour of making collections for a charity. Whether or not when the act bears the true colour of the office or duty or right, the act may be said to be done under colour of that right, office or duty, it is clear that when the colour is assumed as a cover or a cloak for something which cannot properly be done in performance of the duty or in exercise of the right or office, the act is said to be done under colour of the office or duty or right. It is reasonable to think that the Legislature used the words "under colour" in section 161 (1) to include this sense. It is helpful to remember in this connection that the words "colour of office" has been stated in many Law Lexicons to have the meaning just indicated above. Thus in Wharton's Law Lexicon, 14th Edition, we find at page 214 the following:—

"Colour of office"—

"When an act is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour."

In Stroud's Judicial Dictionary, 3rd Edition, we find the following at page 521:—

Colour : “ ‘Colour of office’ is always taken in the worst part, and signifies an act evil done by the countenance of an office, and it bears a dissembling face of the right of the office, whereas the office is but a veil to the falsehood, and the thing is grounded upon vice and the office is as a shadow to it. But ‘by reason of the office’ and ‘by virtue of the office’ are taken always in the best part.”

It appears to us that the words “under colour of duty” have been used in section 161 (1) to include acts done under the cloak of duty, even though not by virtue of the duty. When he (the Police Officer) prepares a false Panchnama or a false report he is clearly using the existence of his legal duty as a cloak for his corrupt action or to use the words in Stroud’s Dictionary “as a veil to his falsehood”. The acts thus done in dereliction of his duty must be held to have been done “under colour of the duty”.

We do not see how the fact that the seizure was made on 23rd and the false report was prepared on the 24th affects this position. Whether the false report was prepared on the 23rd or 24th the fact still remains that he prepared this under colour of his duty to prepare a correct Panchnama and a correct report and there is no escape from the conclusion that the acts by which the offence under section 218 of the Indian Penal Code was alleged to have been committed by the appellant were done by him under colour of a duty laid upon him by the Bombay Police Act.

The interpretation of the words “under colour of office” as used in section 18, sub-section (3) of the Bombay District Police Act, 1890, which was in almost the same words as the present section 161 (1) except that the new section gives the protection also to the Revenue Commissioner or the Commissioner, came up before the Bombay High Court on several occasions. In *Madhav Ganpat Prasad v. Maihidkhan*¹ the complaint was that a Sub-Inspector of Police had vexatiously seized the complainant’s property and so committed an offence punishable under section 63 (b) of the Bombay District Police Act, 1890. It was held—or rather assumed—that the case fell within the provisions of section 80, sub-section (3). The matter was considered by a Full Bench of the Bombay High Court in *Narayan Hari v. Yeshwant Raoji*². There the allegation against the Police Officer was that while investigating a case he had deliberately taken down the statement of a witness incorrectly. The Police Officer was prosecuted under section 167 and section 218 of the Indian Penal Code more than six months after the statement had been recorded. The question raised was whether the complaint should be dismissed under section 80, sub-section (3) on the ground that the act complained of was done under colour of a duty. The Full Bench decided that even though the act was done in deliberate disregard of his proper duty and authority the act was one done under colour or in excess of duty imposed or an authority conferred on him by the Police Act. This view of the meaning of the word under colour of duty was, in our opinion, correct.

Learned Counsel drew our attention to another decision of the Bombay High Court in *Parbat Gopal Walekar v. Dinkar S. Shinde*³, where the act of a Police Constable in driving rashly and negligently when driving a police jeep which was carrying a Sub-Inspector of Police, who was proceeding for an enquiry, was held not to be done “under colour or in excess of the duty imposed upon him as a Constable-driver.” In the concluding portion of the judgment the learned Judge has observed thus :—

“If the police are entitled to have the benefit of a shorter period of limitation when they are acting in pursuance of a duty imposed on them by the Police Act or any other law in force or any rule thereunder, and if the act is alleged to amount to an offence or a wrong, then if it is found to have been done in gross violation of their duty or in contravention of the limits placed upon the performance of such duty by the law itself or any rules framed thereunder, the act would cease to be an act done under colour or in excess of their duty.”

On the facts of that particular case the decision may well be justified on the ground that injuring a person by rash and negligent driving has no relation to the duty of the Constable to drive the motor vehicle. We think it right however to point

1. (1917) I.L.R. 41 Bom. 737.
2. A.I.R. 1928 Bom. 352 (F.B.).

3. 63 Bom L.R. 189.

out that the view that if the alleged act "is found to have been done in gross violation of the duty" then it ceased to be an act done under colour, is not correct. As we have pointed out above it is only when the act is in violation of the duty that the question of the act being done under colour of the duty arises. The fact that the act has been done under gross violation of the duty can be no reason to think that the act has not been done under colour of the duty.

We have come to the conclusion that on a proper interpretation of the words "under colour of duty", the acts in respect of which the prosecution was instituted were acts done under colour of duty imposed upon him by the Police Act.

On behalf of the State it was contended next that section 161 (1) of the Bombay Police Act is limited to offences against the Act and has no application to offence under the Indian Penal Code. We can find no substance in this contention. "Offence" has been defined in the Bombay General Clauses Act to mean any act or omission made punishable by any law for the time being in force. On this definition the word "offence" as used in section 161 (1) clearly includes an offence under the Indian Penal Code. If it was the intention of the Legislature to limit the application of section 161 (1) to offences under the Bombay Police Act only that would have been clearly mentioned. It is worth noticing in this connection the language used in section 150 of the Bombay Police Act. That section runs thus :

"Offences against this Act, when the accused person or any one of the accused persons is a Police Officer above the rank of a Constable, shall not be cognizable except by a Presidency Magistrate or a Magistrate not lower than a Second Class Magistrate."

If the Legislature had intended to limit the application of section 161 (1) to offences under the Police Act only, it would have instead of using the words "in any case of alleged offences" used words like "in any case of offences against this Act." It appears clear that the Legislature deliberately gave the protection of section 161 (1) to offences against any law and there is no justification for our limiting that protection to offences under the Police Act only. It must accordingly be held that the prosecution against the appellant should have been dismissed in accordance with the provisions of section 161 (1) of the Bombay Police Act.

We accordingly allow the appeal, set aside the order of conviction and sentence passed against the appellant and order that the case against him be dismissed.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

Maulud Ahmad

*Appellant**

v.

The State of Uttar Pradesh

Respondent.

Penal Code (XLV of 1860), section 218—Police Officer—Manipulating police diary to save another accused—Another accused acquitted of offence and also of abetting under section 218—Conviction of public servant—Not affected.

U.P. Police Act, sections 36 and 42—Scope—For anything done or intended to be done under the Act—Prosecution under section 218 of the Penal Code—Limitation of three months—Not applicable to an offence under the Penal Code.

It is manifest that whether C was guilty or not, at the time the false entries were made in the case diary by x (the accused) there was every likelihood of being prosecuted along with others for causing the death of R and another. Indeed as expected C and others were prosecuted though they were acquitted. On the said facts the mere acquittal of C cannot displace the finding that X the accused manipulated the record with an intent thereby to save or knowing it to be likely that he would thereby save C from legal punishment. If X had made the false entry in the diary and manipulated other records with

a view to save C from the legal punishment that might be inflicted upon him, the mere fact that he was subsequently acquitted of the offence could not make it any the less an offence under section 218 of the Indian Penal Code. The acquittal of C for the abetment of the offence under section 218 of the Indian Penal Code committed by X does not affect the conviction of X under section 218 of the Indian Penal Code.

The period of three months prescribed for commencing a prosecution under section 42 of the U. P. Police Act is only with respect to prosecution of a person for something done or intended to be done by him under the provisions of the U. P. Police Act or under general police powers given by the Act. Section 42 does not apply to prosecutions against any person for anything done under the provisions of any other Act or under police powers conferred under any other Act. Under section 36 nothing contained in the Police Act shall be construed to prevent any person from being prosecuted under any Regulation or Act for any offence made punishable by this Act or for being liable under any other Regulation or Act or any other or higher penalty or punishment than is provided for such offence by this Act.

The prosecution in the present case was for an offence under section 218 of the Indian Penal Code which is an offence under a different Act and for which a much higher punishment is prescribed. By reason of section 36 of the Police Act, section 42 thereof cannot apply to such a prosecution.

If a Police Officer manipulates the record such as police diary etc., it will be the end of honest criminal investigation in our country. Such offences shall receive deterrent punishment.

Appeal by Special Leave from the Judgment and Order dated the 1st February, 1961, of the Allahabad High Court (Lucknow Bench), Lucknow in Criminal Appeal No. 403 of 1960.

S.P. Sinha, Senior Advocate (Shaukat Hussain, Advocate, with him), for Appellant.

G. C. Mathur and C. P. Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal by Special Leave against the judgment and order of the Allahabad High Court, Lucknow Bench, confirming that of the Additional Sessions Judge, Kheri convicting the appellant under section 218 of the Indian Penal Code and sentencing him to two years' rigorous imprisonment. The prosecution case may be briefly stated :—

Some Railway officers and others, including one Chauhan, Railway Guard, went on two trolleys towards Bhitra for a shoot. Chauhan had with him a double barrelled gun of twelve bore bearing No. 23727. On either side of the Railway line there were reserve forests of the State. Some of the group got down from the trolleys, flashed a search-light and fired their guns. Two persons were shot dead. Chauhan in order to create evidence in his favour got a report entered by the appellant, a Police Head-constable, in the General diary of the Police Station purporting to have been taken on 13th December, 1956, at 6-45, P.M. to the effect that Chauhan had deposited the said gun in the Police Station. Many other manipulations were made by the appellant in the Police record to bring it in conformity with the said false entry. Several persons, including Chauhan and the appellant were prosecuted under sections 304-A, 201/109, 120-B and 218/109 of the Indian Penal Code, as well as under section 26 of the Indian Forest Act, and they were tried by the Additional Sessions Judge, Kheri. The appellant was also charged under section 218 of the Indian Penal Code. All the accused were acquitted except the appellant who was convicted under section 218 of the Indian Penal Code and sentenced to two years' rigorous imprisonment. The appeal filed by him to the High Court was dismissed. Hence this present appeal.

The learned counsel for the appellant raised two questions before us. The first was that as Chauhan was acquitted of all the offences with which he was charged, the charge against the appellant under section 218, Indian Penal Code, should fall with it and the second that the prosecution against the appellant having been launched three months after the entry is alleged to have been made by him in the Police diary was barred by limitation under section 42 of the Police Act.

Section 218 of the Indian Penal Code reads :—

"Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing frames that record or writing in a manner which he knows to be

incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment or with intent to save, or knowing that he is likely thereby to save. . . . shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both."

The crux of the section so far as it is relevant to the present inquiry is that the public servant should have acted in the manner contemplated by this section with an intent thereby to save or knowing it to be likely that he will thereby save any person from legal punishment.

The argument of the learned counsel under the first head hinges upon the alleged inconsistency and conflict between the acquittal of Chauhan and the conviction of the appellant. Chauhan had been charged along with the appellant for offences under sections 304-A, 120-B, 201/109 and 218/109 of the Indian Penal Code and section 26 of the Indian Forest Act. He was acquitted. Omitting for the time being section 218/109, Indian Penal Code, let us see on what grounds he was so acquitted. The learned Additional Sessions Judge found that the following facts had been established :—

" (1) That there were three guns with the party, including Chauhan's gun ;

(2) That between miles 8 and 9 after the trolleys were stopped and were placed by the side of the track, Ramdeo trolley-man and Lala went away and shortly after that four gun-shots were heard and shortly after that Lala returned alone and then all the members of the party excepting Ramdeo returned to Mailani by the Cane Special.

(3) That at the time when the four gun-shots were heard, Chauhan and Gupta were standing just near the track with their guns in their hands and Dilawar, Amin and Hira also remained standing by the side of the track.

(4) The medical evidence does not say about the duration of the gun-shot injuries of Ramdeo and Chhotey but from the above-noted discussion of the evidence it would appear that Ramdeo and Chhotey were likely to have received gun-shot injuries between 7-24 to 7-40 p.m. in the night between 14th and 15th December, 1956."

From the foregoing facts found, the learned Judge came to the conclusion that there was no direct or substantial evidence of any kind connecting any of the five accused, including Chauhan, with the death of Ramdeo and Chhotey. It would be seen from the said findings that the learned Judge accepted the evidence that Chauhan was in the shooting party that day, that he carried a gun with him, that two persons were killed with gun shots but for some reason with correctness of which we are not concerned here he acquitted Chauhan. It is, therefore, manifest that whether Chauhan was guilty or not, at the time the false entries were made in the case diary there was every likelihood of Chauhan being prosecuted along with others for causing the death of Ramdeo and Chhotey. Indeed as expected Chauhan and others were prosecuted though they were acquitted. On the said facts the mere acquittal of Chauhan cannot displace the finding of the learned Judge that the appellant manipulated the record with an intent thereby to save or knowing it to be likely that he would thereby save Chauhan from legal punishment. If the appellant had made the false entry in the diary and manipulated other records with a view to save Chauhan from the legal punishment that might be inflicted upon him the mere fact that he was subsequently acquitted of the offence could not make it any the less an offence under section 218 of the Indian Penal Code. Nor can we accept the contention that the acquittal of Chauhan for the abetment of the offence under section 218 of the Indian Penal Code committed by the appellant affects the conviction of the appellant under section 218 of the Indian Penal Code. The gravamen of that charge against Chauhan is that he abetted the appellant in making a false entry in the diary and manipulating the record to fit in with that false entry. The Additional Sessions Judge considered the following three points in connection with the said offence :—

(1) Whether Chauhan abetted Maulud Ahmad in making false entries in the General Diary of Police Station, Mailani?

(2) Whether Chauhan deposited his gun at Police Station, Mailani in the night between 14th and 15th, December, 1956, and got the entry of the deposit in the General Diary ante dated, i.e., according to the entry the gun was shown to be deposited on 13th December, 1956, at 18-45 hours and whether Chauhan did it after consultation with Dilawar?

(3) Whether Maulud Ahmad (accused) made false entries in the General Diary of Police Station, Mailani with the intention to save or knowing it likely that he would thereby save the offenders from legal punishment and by that false entry he was trying to get the evidence of the offences under sections 304-A of the Indian Penal Code and 26 of the Indian Forest Act to disappear?

The learned Judge found on the third point that the appellant intentionally falsified the official record with a view to save Chauhan but he acquitted Chauhan by giving him the benefit of doubt on the ground that his signature was not found against the entry of deposit of the gun on 13th December, 1956, and also against the entry of the return of the gun on 18th December, 1956. In the view of the learned Judge it was not established conclusively that Chauhan abetted the appellant in manipulating the record but that could not exonerate the appellant for it had been held on the evidence that false entries had been made in the record by the appellant with a view to save Chauhan. Whether the acquittal of Chauhan was correct or not, the conviction of the appellant is not inconsistent with that of the acquittal of Chauhan. That apart, it appears to us from the record that the acquittal of Chauhan is not justified in the circumstances of the case. Though we cannot convict him as the State has not preferred an appeal to the High Court against his acquittal, we cannot rely upon that acquittal to acquit the appellant against whom the case has been proved to the hilt. We therefore, hold that the conviction of the appellant is not inconsistent with the acquittal of Chauhan.

The second question that is the question of limitation depends upon the provisions of section 42 of the Police Act. Section 42 reads :—

“All . . . prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police-powers hereby given shall be commenced within three months after the act complained of shall have been committed, and not, otherwise. ;”

The period of three months prescribed for commencing a prosecution under this section is only with respect to prosecution of a person for something done or intended to be done by him under the provisions of the Police Act or under general police powers given by the Act. Section 42 does not apply to prosecutions against any person for anything done under the provisions of any other Act or under police powers conferred under any other Act. Under section 36 nothing contained in the Police Act shall be construed to prevent any person from being prosecuted under any Regulation or Act for any offence made punishable by this Act or for being liable under any other Regulation or Act or any other or higher penalty or punishment than is provided for such offence by this Act. This section makes it clear that the provisions of the Act including section 42 do not preclude a person from being prosecuted for an offence under any other Act. A combined reading of these provisions leads to the conclusion that section 42 only applies to a prosecution against a person for an offence committed under the Police Act.

Under section 29 of the Police Act a Police Officer, who is guilty of any violation of a duty, shall be liable on conviction before a Magistrate to a penalty prescribed thereunder. Section 44 thereof imposes a duty on every officer in charge of a Police Station to keep a General Diary in such form as prescribed. If the appellant did not discharge his duty in the matter of keeping a regular diary, he had committed an offence under section 29 of the Act. If he was prosecuted for such an offence

under section 42, it should be done within the time laid down thereunder, but the prosecution in the present case was for an offence under section 218 of the Indian Penal Code which is an offence under different Act and for which a much higher punishment is prescribed. By reason of section 36 of the Police Act, section 42 thereof cannot apply to such a prosecution.

An appeal is made for the reduction of the sentence on the ground that the Head Constable was only a tool in the hands of a superior officer who might have been approached by Chauhan. There is nothing on the record to disclose that Chauhan approached any superior officer in the Police Department and that the appellant had manipulated the records on the dictation of such an officer. This is a pure surmise based upon an observation made by the learned Judge of the High Court in the judgment. There is nothing improbable in Chauhan or some other person interested in him directly approaching the appellant and the appellant acting in the manner he did for consideration or otherwise. If a police officer manipulates the record such as police diary etc., it will be the end of honest criminal investigation in our country. Such offences shall receive deterrent punishment. The punishment awarded errs more on the side of leniency than otherwise.

For the aforesaid reasons we hold that the decision of the High Court is correct. The appeal fails and is dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, K. SUBBA RAO AND N. RAJAGOPALA AYYANGAR, JJ.

C. Abdul Shukoor Saheb

Appellant,*

v.

Arji Papa Rao (deceased) after him his heirs and legal representatives and others

Respondents.

Transfer of Property Act (IV of 1982), section 53—Scope—Fraudulent transfer—What amounts to—Good faith of the purchaser—Burden of proof—Suit to set aside a summary order under Order 21, rule 63, of the Civil Procedure Code (V of 1908)—Defence that sale was voidable as fraudulent—If open.

The terms of section 53 (1) of the Transfer of Property Act are satisfied even if the transfer does not "defeat" but only "delays" the creditors. The fact therefore that the entirety of the debtors' property was not sold cannot by itself negative the applicability of section 53 (1) unless there is cogent proof that there is other property left, sufficient in value and of easy availability to render the alienation in question immaterial for the creditors.

In the circumstances, [viz., that the firm was in a financial embarrassment at the time of the impugned sale, that the parties belonged to the same community and well-known to each other, that there was pressure on the partners, by the creditors of the firm immediately prior to the impugned sale, that the document of sale was registered at Madras (though the property was in Vizag.) and that the purpose of the sale at the relevant time could not be properly explained....] the object of the transaction was to put the property out of the reach of the creditors. The transfer was therefore plainly within the terms of the 1st paragraph of section 53 (1) of the Transfer of Property Act and was voidable at the instance of the decree-creditor.

Where fraud on the part of the transferor is established, i.e., by the terms of paragraph (1) of section 53 (1) being satisfied, the burden of proving that the transferee fell within the exception is upon him and in order to succeed he must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer had been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business.

The plaintiff was not a transferee in good faith and the transfer itself was a scheme by the transferor with the knowledge and concurrence of the transferee to put the property out of the reach of the creditors. The plaintiff's suit was liable to be dismissed for the reason that the defence plea invoking section 53 (1) of the Transfer of Property Act was made out.

An attaching creditor who has succeeded in the summary order under Order 21, rules 58 to 61 can, in a suit to set aside the summary order under Order 21, rule 63, raise by way of defence the plea that the sale in favour of the plaintiff the transferee claimant is vitiated by fraud under section 53 (1) of the Transfer of Property Act.

There is nothing in section 53 (1) of the Transfer of Property Act as it originally stood which precluded a defence by an attaching creditor to a suit to set aside a summary order under Order 21, rule 63 of the Civil Procedure Code that the sale in favour of the plaintiff is vitiated by fraud and the amendment has made no change in this matter.

It was merely to have a uniform rule and to avoid the conflicting decisions that the third paragraph was inserted so that after the amendment the rule that a suit by a creditor should be brought in a representative capacity would apply as much to a suit to set aside a summary order under Order 21, rule 63 as to other suits. There was nothing in the terms of the amended section 53 (1) which referred to a defence to a suit.

From a provision as to how a plaintiff, if he filed a suit, should frame it, there is no logical process by which it could be held that a defendant cannot impugn the validity of the sale which is voidable at his instance.

Ramaswami Chettiar v. Mallappa Reddi, (1920) I.L.R. 43 Mad. 760 : 39 M.L.J. 350 (F.B.), approved.

Appeal from the Judgment and decree dated the 19th June, 1958 of the Andhra Pradesh High Court in Appeal Suit No. 944 of 1953.

K. Bhimasankaram, Senior Advocate, (*J. V. Krishna Sarma* and *T. Satyanarayana*, Advocates with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate (*A. Vedavalli*, Advocate and *N. Rajeshwara Rao* and *A. V. Rangam*, Advocates, with him), for Respondents Nos. 1 (a) and 1 (b).

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal comes before us on a certificate of fitness granted by the High Court of Andhra Pradesh under Article 133 (1) (a) of the Constitution.

The following facts are necessary to be stated to appreciate the contentions urged before us. We consider it would be convenient to refer to the parties by their array in the trial Court. The 2nd defendant—Firm Hajee Abdul Kadir Sahib and Lala Batcha Sahib & Co., had been apparently carrying on business in several places including Vizianagaram, Bellary, Madras, etc., in skins and hides since 1941 when the partnership was formed between the 3rd and the 4th defendants. It was common ground that from about 1947 or 1948 the firm had not been doing any business in Vizianagaram and by that time it had contracted quite a large volume of debts, the tannery business there proving a loss. The two partners accordingly entered into a deed of dissolution dated 31st March, 1949, in which it is stated that the book-debts, stock-in-trade, immoveable properties and other assets including the goodwill of the firm were of the value of Rs. 2,90,000 and at the same time that the partnership which was admitted to be suffering losses owed debts to the extent of Rs. 2½ lakhs. It was agreed between the partners that the 3rd defendant Abdul Shukoor Saheb should go out of the partnership taking with him one item of property in Vaníyambadi valued at Rs. 20,000, while the suit tannery which was estimated as of the same value was to become the sole property of the 4th defendant who was described in the deed as “the continuing partner”. Soon after this deed of dissolution the 4th defendant entered into an agreement with the plaintiff for the sale to him of the suit property for a sum of Rs. 19,000, and later executed the deed of sale on 20th May, 1949. The plaintiff was, however, advised that it would be safer to have the conveyance in his favour executed by the other partner also and accordingly the 3rd defendant was also an executant of the sale deed. On the execution of the sale deed the plaintiff entered into possession and he claimed to have thereafter effected improvements to the property.

While so, the 1st defendant—Arji Papa Rao—filed suit O.S. No. 46 of 1950 in the Court of Subordinate Judge at Visakhapatnam for the recovery of a sum of Rs. 12,950-5-8 against the 2nd defendant firm and its partners defendants 3 and 4 and obtained a decree for the sum claimed with interest and costs on 19th June, 1951. Soon after filing the plaint he obtained an order for attachment before judgment of the suit property and that order was on the passing of the decree made absolute, subject however, to the result of a claim petition which had been filed by the plaintiff for raising the attachment. The Subordinate Judge of Visakhapatnam dismissed the plaintiffs claim and this has led to the suit O.S. No. 145 of

1951 out of which this appeal arises to set aside that summary order under Order 21, rule 63, Civil Procedure Code. The plaintiff impleaded as parties to the suit besides the attaching decree-holder who was made the 1st defendant, the debtor-firm and the two partners as defendants 2 to 4 respectively and the son of the 4th defendant who executed the sale deed as his agent under a power of attorney as the 5th defendant.

The plaintiff claimed that he purchased the property *bona fide* and for its full value, that since its purchase he having entered into possession, was in enjoyment thereof in his own right, paying the rates and taxes due thereon and had effected valuable improvements thereto, and that consequently the property was not liable to be attached as belonging to the partnership or any of its partners.

Broadly stated, the defence of the 1st defendant—the only contesting defendant, the others either remaining *ex parte* or supporting the plaintiff, was that the sale in favour of the plaintiff was either a sham and nominal transaction or in fraud of creditors of whom he was one. The trial Court upheld the plaintiff's claim that the sale was real and was fully supported by consideration. It also negatived the contention raised by the first defendant that the sale was fraudulent as intended to defeat or delay creditors under section 53 (1) of the Transfer of Property Act. The 1st defendant filed an appeal to the High Court and the learned Judges reversed the decision of trial Judge and directed the dismissal of the plaintiff's suit. It is the correctness of this decision that is challenged in this appeal.

Learned counsel for the appellant raised four principal points in support of the appeal : (1) that on a proper construction of the written statement the only real and effective defence that was raised was that the sale in favour of the appellant was sham and nominal and that the Courts below were in error in proceeding on the basis that the sale was in the alternative impugned as brought about to defeat or delay creditors within section 53 (1) of the Transfer of Property Act ; (2) that on the facts and circumstances of the case it had not been established that the sale in favour of the appellant was vitiated by fraud against creditors falling within section 53 (1) of the Transfer of Property Act ; (3) that in any event, the plaintiff was a purchaser in good faith and for valuable consideration and was therefore protected even on the basis that the transferor intended, by the alienation, to defraud his creditors ; (4) that on a proper construction of section 53 (1) of the Transfer of Property Act, as it now stands, read in the light of the provisions of the Civil Procedure Code particularly those relating to claim petitions under Order 21, rules 58 to 63, a transfer which was voidable under section 53 (1) could be avoided only by a representative suit filed on behalf of creditors and not by an individual creditor who may be defeated or delayed, by way of defence to a suit to set aside a summary order under Order 21, rule 63, Civil Procedure Code.

We shall deal with each of these points and in that order. There is no doubt that the written statement has not been artistically drafted, keeping in view the real distinction between a sham and nominal sale which is not intended to pass title and a sale which is real but which is voidable at the instance of creditors because the transfer is intended in the language of section 53 (1) of the Transfer of Property Act "to defeat or delay creditors". In paragraph 2 of the Written Statement, the 1st defendant stated :—

"The said sale deed is a sham, nominal and collusive document not intended to pass any title but brought about to screen the suit properties from the creditors of defendants 2 to 5. No consideration passed under the sale deed and the recitals thereof in the document are fictions and make-believe."

The paragraph however, further went on to add :

"It is further submitted that even if the sale deed is true, it is in fraud of creditors including the plaintiff and not binding on them"

In paragraph 3 the allegation was made that the plaintiff was the relative of defendants 2 to 5, that the plaintiff and the vendors were natives of the same place and that the sale deed was clandestinely brought into existence at Madras at a time when defendants 2 to 5 were hard-pressed by the plaintiff and other creditors and unable

to pay their debts at Vizianagaram and that in order to put the properties beyond the reach of the creditors, defendants 2 to 4 seem to have hit upon the fraudulent device of the alleged sale to the plaintiff. In the light of these averments it cannot be said that the defendants did not raise two distinct pleas : (1) that the sale was a sham, a pretended sale without any consideration and not intended to pass any title to the nominal purchaser and in the alternative, (2) that even if it were a real transaction supported by consideration and intended to pass title to the plaintiff, still the same was, having regard to the circumstances stated, a fraud upon the creditors and therefore voidable at his instance. Though the pleading in the written statement was in this form, the issues struck did not raise the two defences as distinct pleas but rolled both of them into a single plea raising the question "whether the plaintiff had title to the suit property and whether the claim order was liable to be set aside".

Notwithstanding the indefiniteness in the frame of the issues it could not be said that when the parties proceeded to adduce evidence the same was not directed to both the above defences. As we have necessarily to consider this evidence in dealing with the submissions made to us regarding the correctness of the dismissal of the plaintiff's suit by the High Court it is unnecessary to set out the details of the evidence which indicates that the defence based upon section 53 of the Transfer of Property Act was borne in mind. At the stage of the arguments before the trial Judge it was the subject of keen contest between the parties. The learned trial Judge first dealt with the question as to whether the sale was real as pleaded by the plaintiff or whether it was without consideration and sham and nominal not intended to pass any title, and recorded a clear finding in favour of the plaintiff. After having done so he considered in detail the various circumstances which were relied on by the first defendant in support of the plea that the sale was in fraud of creditors so as to be voidable under section 53 (1) of the Transfer of Property Act. He negatived this plea and upheld the plaintiff's claim to the property and passed a decree in his favour. In these circumstances we consider that there is no force in the objection that there has not been a sufficient plea of a defence based upon section 53 of the Transfer of Property Act as to justify or entitle the Court to afford relief if satisfied that the same was proved.

Before dealing with the second point it is necessary to make a few observations in relation to certain submissions made by learned counsel for the appellant. This was in relation to the manner in which the learned Judges of the High Court had approached this question and arrived at a conclusion adverse to his client. The learned Judges had formulated the questions to be considered in the appeal as follows :—

"The main point that falls to be considered in this appeal is whether the sale deed in favour of the plaintiff, Exhibit A-2, is a genuine transaction supported by consideration ; and, if on this point the finding is in favour of the plaintiff, the further question that falls to be determined is whether the suit sale-deed was executed in fraud of creditors and as such not binding on the first defendant and other creditors of defendants 2 to 5. If the finding on this issue is that the transaction was in fact in fraud of the creditors, the further question that would arise for consideration is whether the plaintiff could claim to be the transferee in good faith and for consideration so as to claim the benefit of the exemption contained in section 53 of the Transfer of Property Act."

Learned counsel had no quarrel with the propositions as here set out or the mode of approach, but his complaint was that in dealing with the appeal these were not kept in view. He urged that they did not consider either initially or even later the question as to whether the sale to the plaintiff was real or was sham and nominal unsupported by consideration and though they stated in one portion of the judgment that they did not propose to consider this question because they were satisfied that the decision on the other points might be sufficient to dispose of the appeal, yet they made passing observations which appeared to throw doubt on the reality of the sale. Again, learned counsel pointed out that though they had formulated the two questions *viz.*, (1) assuming the sale to be real whether the sale was intended by the transferor to defeat or delay creditors and (2) assuming the sale was voidable under section 53 (1) of the Transfer of Property Act whether the plaintiff was a

bona fide purchaser in good faith, as distinct and separate questions, in the discussion which followed they did not keep these two points separate. Besides, it was urged that there were some statements or assumptions made in the judgment which were entirely not warranted by the facts. We cannot say that there is not some force in these submissions. In view of this, the course which we intimated to the learned counsel that we would adopt was that we would ourselves consider the entire evidence on the record and arrive at our own conclusions on such evidence in regard to the two issues : (a) whether the sale was in fraud of creditors, and (b) whether the plaintiff was a *bona fide* purchaser for value and that if it became necessary to arrive at any finding as regards the reality of the sale, we would remand the appeal to the High Court for the matter being considered since the learned Judges had expressly reserved the consideration of that question.

We shall now proceed to consider the facts and circumstances of the case which are relevant to the issue as to whether the sale was to defeat or delay creditors. There was some argument before us about the burden of proof in such cases but learned counsel for the appellant submitted that he would assume for the purpose of argument that the onus was upon the plaintiff-purchaser and that he would satisfy us that that burden had been discharged. This apart, we consider that the question of onus of proof is merely academic at this stage because the entire evidence is before us and except in a rare case where the considerations are evenly balanced, it would have little significance. The circumstances which are relevant for the consideration of this question are these. The second defendant-firm was in financial embarrassment at the time of the sale. The deed of dissolution dated 31st March, 1949, recites that the business carried on by the firm was resulting in losses and that the debts amounted to about 2½ lakhs of rupees. No doubt, it is there stated that the assets of the firm were by consent of the parties estimated of the value of Rs. 2,90,000. This estimate however included the value of the goodwill, which would not be of any real value in the case of a losing business of this sort and we do not know how much was attributed to this item. This apart, the assets were said to be made up of book-debts, stock-in-trade, immoveable property etc. There is however, no indication as to the relative value of these several components to judge whether or not the alienation of the suit property would have the effect of delaying, if not defeating the creditors. It can however be asserted that the picture presented by the deed of dissolution is certainly of a firm whose financial position was far from satisfactory. There is no evidence on the record whether the partners or either of them had any property of their own besides the assets of the partnership for discharging the debts due to the firm's creditors. Though the 4th defendant filed a written statement supporting the plaintiff, the plaintiff did not choose to examine him as a witness in order to elucidate this matter or otherwise explain the circumstances in which the impugned sale was effected.

The next feature to be noticed is that the plaintiff and the 4th defendant were both members of the same community—*labbaik* of North Arcot district, a fairly small and well-knit community several of whom are engaged in the hides and skins business. The learned Judges of the High Court have referred to the plaintiff and the 4th defendant as natives of the same place and as relatives. Learned counsel for the appellant pointed out that whereas the 4th defendant was a native of Vaniyambadi, the plaintiff was a native of Parnambet and the suggestion made that they were relatives had been denied in the evidence. Learned counsel might be right on these matters but we consider that not much turns on them. Both of them were conducting business in Madras and the plaintiff had also a business in Vizianagaram though it was in bidis and not in hides and skins. In these circumstances we consider that it matters little whether they were relatives or not. The significance of the plaintiff and his vendors being members of the same community and well-known to each other consists in this, that the plaintiff might have been chosen because of his willingness to take the sale without any searching enquiry as to the circumstances necessitating it, and because there would be less publicity in the transaction being put through between them—such as for instance inspection of

the property or enquiries in the locality as regards value etc. which would take place if the sale was to be to a total stranger which would attract the attention of the firm's creditors.

The next circumstance is as regards the pressure exerted on the 3rd and 4th defendants by the creditors immediately prior to the impugned sale and which, in the normal course of events, would be relevant as proving that the sale was effected in order to put the property beyond the reach of creditors by converting it into cash. On 20th April, 1948, O.S. No. 162 of 1948 on the file of the District Munsiff's Court, Vizianagaram was filed for the recovery of Rs. 1,016 on a promissory note for Rs. 1,000 executed by the firm. On 8th September, 1948, it was reported as adjusted out of Court. Besides this some other suits were filed for the recovery of amounts from the partnership but they were defended and were ultimately dismissed. Then we come to O.S. No. 191 of 1949 in which the plaint was presented on 4th April, 1949, for recovery of a sum of Rs. 1,385 and odd which was decreed with interest and costs on 22nd November, 1949. The date on which this last mentioned suit was filed is of some significance because of another suit which was filed at about the same time. One Damayanti presented a plaint on 9th March, 1949, against the firm for the recovery of Rs. 3,000 being the principal and interest due on a promissory note. The date fixed for the appearance by the defendant was 4th April, 1949. It will be noticed that the deed of dissolution was executed on 31st March, 1949. The defendant did not enter appearance on the day fixed and the Court passed an *ex parte* decree on 5th April, 1949, for the amount claimed. She filed an application for execution on 18th April, 1949, and obtained an order on 21st April, 1949, for the attachment of the suit property though the attachment was actually effected on 8th June, 1949, because the Court was closed for the summer vacation. Long before these dates the 4th defendant had made up his mind to alienate the suit property and we have a letter from the 4th defendant to the plaintiff as early as 5th February, 1949, which evidences negotiations for the sale of the property. There was apparently some higgling about the price which caused some delay and a few days after the attachment was ordered, on 27th April, 1949, a formal agreement of sale was entered into between the plaintiff and the 4th defendant under which he agreed to purchase the property for a sum of Rs. 19,000 and the agreement recited that the purchaser, *i.e.*, the plaintiff had paid a sum of Rs. 10,000 in advance as earnest money and the sale deed itself was executed on 20th May, 1949. In pursuance of the order dated 21st April, 1949, Damayanti attached the suit property as already stated on 8th June, 1949, and thereupon the plaintiff filed a claim under Order 21, rule 59, Civil Procedure Code, for raising the attachment but this, however, was dismissed on 16th November, 1950, and thereafter the amount of the decree was paid up by the judgment-debtor just a few days before the expiry of the one year period of limitation for filing the suit under Order 21, rule 63, Civil Procedure Code. A suggestion was made to the plaintiff while he was examined in the case that it was he who had paid up the decree debt of Damayanti but he denied it and we shall proceed on the basis that that debt was discharged by the judgment-debtors themselves. For the purpose of establishing that the firm was hard pressed by its creditors at the time of the negotiations which resulted in the sale impugned in these proceedings and at the time of the sale, it matters little who paid this decree debt.

Next we have the circumstance that though the properties were at Vizianagaram, the document was registered at Madras and the suggestion made to the plaintiff was that this was meant as a measure of secrecy to keep this alienation from the knowledge of the firm's creditors. The explanation offered by the plaintiff was that having regard to the distance between the native places of the two parties from Vizianagaram and the proximity of these to Madras and the fact that both the plaintiff as well as the executants were at Madras it was found more convenient to have the document presented for registration at Madras instead of incurring the expenses of a journey to Vizianagaram for having it registered there. The learned trial Judge accepted this explanation and held that the registration of the

sale deed at Madras was not a suspicious circumstance indicating an intention to keep the transaction secret. The learned Judges of the High Court, however, considered it otherwise and expressed the view that this was done in order to keep the transaction secret. We are inclined to agree with the learned Judges of the High Court in their appreciation of this piece of conduct. Admittedly, the 4th defendant had his agents at Vizianagram and similarly the plaintiff himself had his men there to look after his bidi business. There was no impediment in these circumstances and no expenses of travelling involved if only the 4th defendant had executed a power of attorney in favour of some one at Vizianagram to present the document for registration and admit its execution. In fact, it may be mentioned that even the sale deed now impugned was executed not by the 3rd and 4th defendants but by the 4th defendant's son K.L. Abdulla in whose favour a general power of attorney was executed on 26th April, 1949, apparently immediately the agreement for sale was concluded. It is in the light of this feature that we are not disposed to dismiss as irrelevant the circumstance that the document was registered at Madras.

The next feature of the case to which we must direct attention relates to the purpose for which the sale was executed. As regards this, there is no evidence led to indicate why exactly the 4th defendant desired with some urgency to dispose of the property at that juncture. The relevant circumstance in the present case is that there was a great deal of pressure from creditors, who not having been paid the amounts due to them as and when they became due were forced to file suits and those which were decreed were those which were not defended and the firm was mulcted with costs under each of these decrees. In the circumstances one would expect an explanation as to why the sale was being effected. Ordinarily in circumstances such as in this case there could only be two alternatives: (1) a sale in order to pay the creditors out of the proceeds obtained; and (2) a sale in order to convert immoveable property which was capable of being attached and brought to sale for the realisation of the amounts due to the creditors into cash, which could either be secreted or used for the vendor's own purposes. If the purpose was as that indicated in the first of the above alternatives the proceeds of the sale would have been earmarked for the payment of particular debts for which pressure was the greatest. It is needless to add that if this were the case and if creditors who were not so provided were defeated or delayed it would merely be a case of fraudulent preference which could be impugned only under the law relating to insolvency and not as a fraud on creditors for which section 53 of the Transfer of Property Act makes provision. It is, however, common ground that apart from the sale deed not making any provision that the consideration was to be utilised for the discharge of any particular debts, it is not the case of the plaintiff that there was any such stipulation as to the application of the money or that without any stipulation therefor the money was so utilised. It would therefore not be an unreasonable inference to draw from the circumstances of the sale at the juncture at which it took place that the vendor's object was merely to convert this immoveable property into cash, so that it may not be available to the creditors.

Before leaving this point it is necessary to advert to one matter which was suggested by learned counsel for the appellant. He submitted that the property sold was only a part of the assets of the partners and that unless there was evidence to show that nothing was left available for the creditors after the impugned sale, its validity could not be impugned under section 53 of the Transfer of Property Act. We consider that there is no force in this submission. As a matter of fact, there is no evidence as to what other properties the partners had beyond what is contained in the deed of dissolution on 31st March, 1949. But that apart, the terms of section 53 (1) are satisfied even if the transfer does not "defeat" but only "delay" the creditors. The fact therefore that the entirety of the debtors' property was not sold cannot by itself negative the applicability of section 53 (1) unless there is cogent proof that there is other property left, sufficient in value and of easy availability to render the alienation in question immaterial for the creditors. In the

present case, as already pointed out, we have no definite evidence as to the nature and quality of the property left as available to the creditors after the impugned alienation, and though light on this could have been thrown by the 4th defendant being called as a witness, the plaintiff did not choose to take the step, nor indeed did he even summon the production of the accounts of the firm which might have disclosed the true state of affairs.

Each of these circumstances might be capable of some explanation consistent with the case that the transfer now impugned was effected in the normal and ordinary course of business by the 4th defendant for some purpose which did not involve an intention to defeat or delay his creditors, but the question we have to consider is their cumulative effect and so viewed, the conclusion appears irresistible that the object of the transaction was to put the property out of the reach of the creditors. The transfer was therefore plainly within the terms of the 1st paragraph of section 53 (1) of the Transfer of Property Act and was voidable at the instance of the 1st defendant who was a decree-creditor.

The next question is whether the plaintiff is a *bona fide* purchaser for value so as to be protected by the second paragraph of section 53 (1) reading :

“Nothing in the section impairs the rights of the transferee in good faith and for consideration.”

As stated earlier, the learned trial Judge held that Rs. 19,000, the sale price was the full value of the property and that the consideration as recited in the document was paid by the purchaser. This finding has not been set aside by the High Court. We are, therefore, proceeding on the basis that the transfer was real and supported by consideration. The narrow question is whether the plaintiff was a transferee in good faith. It was submitted on behalf of the appellant that the learned Judges of the High Court had directed the dismissal of the plaintiff's suit even without a definite finding that the plaintiff was a party to the fraud on the part of the transferor to defeat or delay the creditors. There might be some force in this submission that there is no specific finding to that effect but that does not in any way assist the appellant. Where fraud on the part of the transferor is established *i.e.*, by the terms of paragraph (1) of section 53 (1) being satisfied, the burden of proving that the transferee fell within the exception is upon him and in order to succeed he must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer had been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. When once the conclusion is reached that the transfer was effected with the intent on the part of the transferor to convert the property into cash so as to defeat or delay his creditors, there cannot be any doubt on the evidence on record that the plaintiff shared that intent. For this purpose the following circumstances may be pointed out :

(1) The plaintiff and the vendor belong to the same community, a small, compact and well-knit one and they must obviously have known each other having been in trade for several years in several places in common and must therefore have been well-acquainted with the financial and business affairs of each other.

(2) This general inference apart, the plaintiff admittedly had with him a copy of the deed of dissolution dated 31st March, 1949, which disclosed that the firm's business had resulted in losses and that it was greatly indebted, the debts amounting to Rs. 2½ lakhs.

(3) If as we have held that registration of the sale deed at Madras was with a view to keep the transaction secret from the creditors, the plaintiff was as much a party to the secrecy as the transferor.

(4) One matter which would be of considerable relevance and significance in this connection would be the enquiries that the plaintiff made before he took the transfer. He no doubt led evidence to show that he consulted his lawyers about the title of the vendor, but any attempt at an enquiry of the 4th defendant

as to why he was effecting the sale of the only immoveable property of the firm which was allotted to him under the deed of dissolution is significantly absent.

In the circumstances, it stands to reason that the plaintiff must be fixed with notice of the design in pursuance of which the transfer was effected. If the object of a transferor who is heavily indebted was to convert his immoveable property into cash for keeping it away from his creditors and knowing it the transferee helped him to achieve that purpose it has naturally to be held that he shared that intention and was himself a party to the fraud. In this connection, there is one circumstance which is rather significant. Even when the plaintiff was fixed with notice that the firm's business had been running at a loss and had accumulated a very large volume of debts as disclosed by the recitals in the deed of dissolution which was placed in his hands, the purchaser did not insist that the consideration which he was paying should be utilised for the discharge of at least some of the debts. We are therefore satisfied that the plaintiff was not a transferee in good faith and that the transfer itself was a scheme by the transferor with the knowledge and concurrence of the transferee to put the property out of the reach of the creditors. The result therefore would be that the plaintiff's suit was liable to be dismissed for the reason that the defence plea invoking section 53 (1) of the Transfer of Property Act was made out.

What remains for consideration is a point of law that was raised on behalf of the appellant that a transfer which is voidable under section 53 (1) of the Transfer of property Act can be avoided only by a suit filed by a creditor impugning the transfer on behalf of himself and the other creditors and not by way of defence to a suit under Order 21, rule 63, Civil Procedure Code, by a claimant whose application has been rejected in summary proceedings under Order 21, rules 58 to 61, Civil Procedure Code.

Section 53 (1) of the Transfer of Property Act, as it stands at present, is, as amended by the Transfer of Property Act (XX of 1929). As part of the argument on this head was based on a comparison of the provisions of the section before and after the same was amended, we shall set out in parallel columns section 53 (1) as it stood before it was amended in 1929 and as it stands as amended :

Section 53 (1) as it stood before the Amending Act, 1929.

"Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration."

Section 53 (1) as it stands after the Amending Act 1929.

"Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors."

Two points were made by the learned counsel in support of this submission ; the first being independent of the amendment effected by the Act of 1929 and the

other based on the provision as amended. The former was based on the impact of the nature of the proceedings under Order 21, rules 58 to 61, Civil Procedure Code, and of the order that would be passed therein and particularly of the questions that would arise in a suit under Order 21, rule 63, Civil Procedure Code to set aside summary orders; while the latter was based on the amendment by which a creditor's suit was required to be in a representative capacity.

It would be seen that so far as the first point was concerned, the amendment made no change and that if the learned Counsel were right the position would have been the same even on the section as it stood before it was amended. It was conceded that on the section as it stood prior to the amendment, there was a direct decision against this argument, of a Full Bench of five Judges of the Madras High Court as early as 1920 (*Ramaswami Chettiar v. Mallappa Reddiar*)¹, which had been consistently followed by every other High Court in India up to this date without any doubt or dissent. Learned Counsel however urged that this Court was not precluded from considering the correctness of this decision notwithstanding it having held the field for over forty years without question. As a legal proposition, Counsel is undoubtedly right, but the question is whether any reasons have been adduced before us to consider that that decision was wrong.

We shall be presently setting out the reasoning on which it is contended that an attaching creditor who has succeeded in the summary proceedings under Order 21, rules 58 to 61 cannot, in a suit to set aside the summary order under Order 21, rule 63, raise by way of defence the plea that the sale in favour of the plaintiffs—the transferee-claimant is vitiated by fraud under section 53 (1) of the Transfer of Property Act, but before doing so it is necessary to point out that this very argument was urged before the Full Bench referred to and after elaborate consideration, rejected by them.

Now the argument as regards the inference to be drawn from the nature of the enquiry in the summary proceedings for investigating claims to property which has been attached is briefly as follows: Section 53 of the Transfer of Property Act assumes that there is a real transfer intended to pass title to the transferee but that the transfer is vitiated by fraud which renders it voidable. In the summary proceedings under Order 21, rules 58 to 61, having regard to the terms of rule 61, the Court is concerned only with the question as to whether the transferee is in possession of the property in his own right and not on behalf of the judgment-debtor. When a transfer is real, though it is liable to be impeached as a fraud on creditors, and the transferee has entered into possession, he would succeed in the summary proceedings, with the result that it is the defeated attaching creditor who would have to figure as a plaintiff. If he figures as a plaintiff the suit would have to be in a representative capacity, that is, under Order 1, rule 8, Civil Procedure Code. In every case, therefore, when a transfer is real but is liable to be set aside under section 53 (1) or the provisions of Order 21, rules 58 to 61, Civil Procedure Code the transferee is bound to succeed in the summary proceedings and the attaching decree-holder would have to figure as a plaintiff and the suit would be a representative suit. From this it is said that it follows that in no case can an attaching creditor who defends a suit to set aside a summary order in his favour resist it on the plea of fraud under section 53 (1).

It would however be seen that this last step which is vital for the argument to have force does not follow, for the argument does not proceed on any construction of the terms of section 53 (1) nor on any legal theory as to the mode or procedure by which the intention to avoid the transaction which the attaching creditor claims is voidable at his instance may be expressed or enforced. The argument would only establish that if the Court investigating claims under Order 21, rule 58, etc. conformed strictly to the terms of those provisions the transferee under a real sale would succeed in those proceedings and he would be a defendant and

1. (1920) I.L.R. 43 Mad. 760 : 39 M.L.J. 350. (F.B.)

need not be a plaintiff in suits to set aside the summary order under Order 21, rule 63. This line of reasoning does not take into account at least the following possibilities :

(1) The claim or objection by the transferee may be rejected, not on the merits but because it has been designedly or unnecessarily delayed (*vide* Order 21, rule 58, Civil Procedure Code). It is certainly not the contention of Learned counsel that when there is a rejection of a transferee's claim under this provision the order of rejection is any the less final and has got to be set aside by a suit contemplated by Order 21, rule 63, Civil Procedure Code in order to overcome the effect of that finality.

(2) The Court making the summary enquiry might come to an erroneous conclusion that the transfer is sham and not real or that the transferee is in possession for the benefit of the judgment-debtor. In the suit filed by the transferee to set aside this erroneous order, the plaintiff would have to establish his title and even if he succeeds in showing that the sale to him was real and effective, still the question would remain whether, having regard to the circumstances of the transfer, the same is not voidable under section 53 (1). Thus there would be occasions when a defeated transferee whose transfer is real might have to figure as a plaintiff in a suit to set aside a summary order under Order 21, rule 63, Civil Procedure Code.

(3) The attaching decree-holder might raise in the summary proceedings two alternative defences to a transferee's claim (a) that the sale was sham and nominal and therefore the possession of the transferee was really on behalf of the judgment-debtor, and (b) that even if the sale be real and intended to pass title it was voidable as a fraud on creditors. It is, no doubt, true that the second or the alternative defence is not open in the claim proceedings, but if however the same were erroneously entertained and an order passed, rejecting the claim of the transferee, the same would nevertheless be an order which would have to be set aside by a suit by the defeated transferee and he cannot ignore it.

It would thus be seen that the entire argument as regards the impact of the nature of the enquiry under Order 21, rule 59, on the defences which would be open in a suit under Order 21, rule 63, depends on two factors : (1) the summary order being passed on the merits and not because the making of the claim was designedly or unnecessarily delayed, and (2) the summary order being right on the merits and strictly in conformity to the provisions of the Code.

As we have already pointed out, the points urged before us as regards the scope of the enquiry into claim petitions was also the subject of elaborate argument and consideration by the learned Judges of the Madras High Court in the Full Bench. Sadasiva Ayyar, J. classified the cases of transferees who failed in their claim petitions and had to file suits to set aside summary orders under Order 21, rule 63 under three heads : (a) Where the transferee was a mere benamidar ; (b) Where he was a fraudulent transferee in possession ; and (c) Where he was a fraudulent transferee not in possession. The learned Judge said :

"A creditor decree-holder, who is in most cases a stranger, cannot reasonably be expected to know of his own knowledge whether a transfer by his judgment-debtor is only fraudulent or is wholly nominal or partly nominal and partly fraudulent, and whether the transferee is in possession and if in possession, whether he is so for himself or for the judgment-debtor. He would therefore, usually both in the claim-petition and in the suit which afterwards arises out of the order against the claimant, be obliged to raise and be justified in raising alternatively all the pleas open to him, and the Court which decided the claim against the claimant might, in its conclusions on each of the three points, be either right or wrong."

He further pertinently pointed out that to hold that a plea based on the transfer being voidable under section 53 (1) could not be raised in defence to a suit to set aside a summary order would mean that "the creditor decree-holder would be in a much worse position for his success in the summary claim proceedings than if he had lost in those proceedings."

Section 53 (1) of the Transfer of Property Act rendered the transaction voidable at the instance of the creditors if the transfer was effected with the particular intent

specified and the statute does not prescribe any particular method of avoidance. Referring to this the learned Judges observed :

"If the creditor knowing of the transfer applies for attachment ; the application is sufficient evidence of his intention to avoid it ; if he only hears of the transfer when a claim-petition is preferred under Order 21, rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent suit under rule 63."

They further pointed out that

"the suit under rule 63 is by the unsuccessful party to the claim-petition 'to establish the right which he claims to the property in dispute'. Whether this suit be instituted by the attaching decree-holder or by the transferee-claimant, it must equally be decided in favour of the former if the transfer is shown to have been fraudulent ; because in consequence of the fraudulent character of the transfer and its avoidance by the judgment-creditor, the result is that the transferee has not the right which he claims, namely, to hold the property free from attachment in execution by the judgment-creditor".

The learned Judges based their conclusion on this and on several other lines of reasons which we consider unnecessary to set out, but it is sufficient to say that we are in entire agreement with all of them. There is therefore no substance in the point that there is anything in section 53 (1) as it originally stood which precluded a defence by an attaching creditor to a suit to set aside a summary order under Order 21, rule 63 that the sale in favour of the plaintiff is vitiated by fraud of the type specified in the earlier quoted provision and the amendment has admittedly made no change in this matter.

It was next urged that the third paragraph of the amended section 53 (1) has effected a change in the law and that thereafter transfers voidable under 1st paragraph of section 53 (1) could be avoided only in suits filed by a defeated or delayed creditor as plaintiff suing on behalf of himself and other creditors. We consider that there is no substance in this objection either.

We shall first refer to the purpose of the amendment. In decisions rendered prior to the amendment, there were a large number in which it was held, following certain English cases decided with reference to 13 Eliz. Ch. 5 on which section 53 (1) was based, that suits by creditors for avoiding a transfer under section 53 (1) was a representative action. To that general rule however, an exception was recognised in a number of decisions when the suit was to set aside a summary order under Order 21, rule 63 and was brought by an attaching decree-holder against whom an adverse order had been made in the summary proceedings, it being held that such a suit need not be in a representative capacity. The decisions on this point were however not uniform. It was merely to have a uniform rule and to avoid these conflicting decisions that the third paragraph was inserted so that after the amendment the rule that a suit by a creditor should be brought in a representative capacity would apply as much to a suit to set aside a summary order under Order 21, rule 63 as to other suits. It was not suggested that there was anything in the terms of the amended section 53 (1) which referred to a defence to a suit and, in fact, learned Counsel did not contend that if a defence under section 53 (1) could be raised by a defeated attaching creditor such a defence had to be in a representative capacity, and we consider that learned Counsel was correct in this submission. From a provision as to how a plaintiff, if he filed a suit, should frame it, we can see no logical process by which it could be held that a defendant cannot impugn the validity of the sale which is voidable at his instance. We have, therefore, no hesitation in rejecting the legal point urged on behalf of the appellant.

The result is that the appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Laxman Purshottam Pimputkar

.. Appellant*

v.

The State of Bombay and others

.. Respondents.

Bombay Watan Act, section 79—Revisional Jurisdiction under—Whether administrative and open to revision or review by Government—Bombay Revenue Jurisdiction Act (X of 1876), section 4 (a)—Bar of suit under—Nature and scope of.

The order of the Collector under section 12 of the Watan Act is not an administrative order but a quasi-judicial order and can be rectified or modified or set aside by the Commissioner in appeal or by the State Government in Revision under section 79. The Collector's declaration has to be supported by reasons in writing and therefore it follows that it can be made only after holding an enquiry, which means that the Collector has to hear both the parties and consider such evidence oral and documentary as may be adduced. The procedure must therefore be considered as quasi-judicial in character.

When an authority exercises its revisional powers it necessarily acts in a judicial or quasi-judicial capacity and finality attaches to such orders. In the absence of any express provision empowering it to review the order the impugned order made by the Government is *ultra vires* and beyond its jurisdiction.

Where something done or an order made is no act or order in law at all because it is without jurisdiction and null and void the provisions of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) are not attracted. It is settled law that the civil Courts have the power and jurisdiction to consider and decide whether a tribunal of limited jurisdiction has acted within the ambit of the powers conferred upon it by the statute to which it owes its existence, or whether it has transgressed the limits placed on those powers by the Legislature.

Gullapalli Nageswara Rao v. Andhra Pradesh Road Transport Corporation and another, (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156: (1959) 2 An.W.R. (S.C.) 156: (1959) 1 S.C.R. 319, referred to.

Appeal by Special Leave from the Judgment and Decree dated the 17th February, 1955. of the Bombay High Court in Second Appeal No. 1533 of 1952.

P. K. Chakravarti, Advocate, for *B. C. Misra*, Advocate, for Appellant.

N. S. Bindra, Senior Advocate (*S. B. Jathar*, Advocate, and *P. D. Menon*, Advocate, for *R. H. Dhebar*, Advocate, with him), for Respondent No. 1.

K. V. Joshi and *Ganpat Rai*, Advocates, for Respondents Nos. 2 to 4.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave from the judgment of the High Court of Bombay affirming the decree of the District Judge, Thana, setting aside the decree in favour of plaintiff-appellant.

The relevant facts which are not onger in dispute are these : The plaintiff's family are grantees of the Patilki Watan of some villages in Umbergaon taluka of Thana District of Maharashtra, including the villages of Solumbha, Maroli and Vavji. Defendants 2 to 4 also belong to the family of the plaintiff. The plaintiff represents the seniormost branch of the family while the defendants 2 to 4 represent other branches. The dispute with which we are concerned in this appeal relates to the Patilki of Solumbha. Under the Bombay Hereditary Offices Act, 1874 (Bombay Act III of 1874) the person who actually performs the duty of a hereditary office for the time being is called an Officiator. It is common ground that the Officiator had been selected from the branch of the plaintiff from the year 1870 in which year the propositus Krishna Rao Pimputkar died. After his death he was succeeded by his eldest son Vasudev upon whose death in 1893 his eldest son Sadashiv was the Officiator. Sadashiv died in 1901 and was succeeded by the Purshottam, who was Officiator till the year 1921 when, because of the disqualification incurred by him, a deputy was appointed in his place. After the death of Purshottam in 1940 his son the plaintiff-appellant Laxman became, the Officiator.

In the year 1914 the descendants of Krishnarao, who were till then joint, effected a partition of the family property which consisted of Inam and Watan lands in various villages including the villages of Solsumbha, Maroli and Vavji. The document embodying the partition is Exhibit 49. Under that partition lands which had so far been assigned for remuneration of the Patilki of Solsumbha were allotted to the branch of the defendants while some other lands were given to the branch of the plaintiff. It would appear that Purshottam had not subscribed to the partition deed in the beginning but later on he appears to have acquiesced in it and apparently for this reason it has been held by the Courts below that he was a party to the partition. It may be mentioned that after Purshottam had incurred a disqualification, the deputies who acted for him were not allowed to take possession of the lands of Solsumbha which are now in dispute in spite of the objections raised by these persons. They were instead allowed a remuneration of Rs. 240 per annum which was to be paid by the members of the family in possession of the Watan lands. This position continued till 1946.

It may be mentioned that after the death of Purshottam the plaintiff was initially appointed Patil for five years. But eventually he was appointed Officiator for life.

In the year 1944 the plaintiff moved the Government, *vide* Exhibit 47, for the exemption of the Watan lands which were in the possession of defendants 2 to 4 and for making them over to him. The Government, after causing some enquiry to be made, resumed those lands by its order dated 9th October, 1946, Exhibit 36, and directed their restoration to the plaintiff. The defendants thereafter moved the Government for reconsideration of that order. The Government eventually modified its previous order by directing that the defendants 2 to 4, who were in possession of the lands, should continue to retain it but that they should pay such amount of rent as may be fixed by Government from time to time. This order was passed on 2nd May, 1947, and by virtue of that order the rent payable by defendants 2 to 4 was raised from Rs. 240 to Rs. 1,000. The plaintiff thereupon instituted the suit out of which this appeal arises for a declaration that the order of the Government dated 2nd May, 1949, and an ancillary order dated 1st March, 1949, are null and void and inoperative; that the defendants should remove "all obstructions and hindrances caused to the property acquired by the plaintiff as Watan grant ... and that they should give the same into the plaintiff's possession"; that the defendants should render to the plaintiff the account of the income from his property and pay him the costs of the suit.

The suit was resisted by the defendants, the first of whom was the State of Bombay, (now Maharashtra) on various grounds. The main grounds were that the orders complained of were administrative orders and no suit lies to set them aside, that the suit was barred by the provisions of section 4 (b) of the Bombay Act X of 1876 and that the suit was barred by limitation. It may, however, be mentioned that when the defendants preferred an appeal before the District Judge they confined their attack to the decree to one ground only and that was about the competence of Government to re-consider the order of 1946.

The plaintiff's contention is that the order made by the Government on 9th October, 1946 was a judicial order passed by the Government in exercise of its revisional jurisdiction under section 79 of the Watan Act and that it was not competent to the Government to revise or review that order in the absence of a provision in the Act empowering the Government to do so.

It is not disputed that alienation of Watan lands without the sanction of the Government is prohibited by section 5 of the Watan Act. Similarly the alienation of Watan lands assigned as remuneration without the sanction of the Government is prohibited by section 7 of the Act. Section 11 empowers the Collector, after recording his reasons in writing, to declare certain types of alienations to be null and void. Section 12 provides that it shall be lawful for the Collector whenever it may be necessary in carrying out the provisions of certain sections, including section 11 (a) to summarily evict any person wrongfully in possession of any

or (b) to levy any rent due by any person in the manner that may be prescribed in any law for the time being in force for the levy of a revenue demand. According to the defendants the discretion conferred upon the Collector by section 12 either to evict a person in wrongful possession of any land or to require him to pay rent with respect to it is of an administrative nature and, therefore, the order of the Collector made under section 12 can be varied from time to time by the Collector or can be challenged by the party aggrieved only in the manner provided by the Act, that is, by preferring an appeal or an application in revision and in no other manner. Undoubtedly, if the order is of an administrative nature it would be beyond the purview of the jurisdiction of the civil Court. The first question to be considered is whether the order of a Collector under section 12 is administrative in character. It has to be borne in mind that before action is taken under section 12, the Collector has to make a declaration under section 11. This declaration has to be supported by reasons in writing and, therefore, it follows that it can be made only after holding an enquiry which means that the Collector has to hear both the parties and consider such evidence, oral and documentary, as may be adduced by them before him. So far, therefore, the procedure must be considered as quasi-judicial in character. This Court has held in *Gullapalli Nageswara Rao v. Andhra Pradesh Road Transport Corporation & another*¹ as well as recently in *Board of High School and Intermediate Education, U.P. v. Ghanshyam Das Gupta*², that an order will be deemed to be of quasi-judicial character not only when there is a contest between one individual and another but also when the contest is between an authority purporting to do an act and a person opposing it provided the statute imposes a duty on the authority to act judicially. Section 12 undoubtedly confers discretion on the Collector to make an order of one of two kinds, after he declares that an alienation is null and void. The order of the Collector in exercise of his discretion affects the rights of parties to property and is further open to challenge before the Commissioner and the State Government under sections 77 and 79 of the Watan Act respectively. It is therefore difficult to appreciate how the order can be regarded as administrative. Mr. Bindra who appears for the State, however, contends that though the enquiry contemplated by section 11 may be regarded as a quasi-judicial proceeding the ultimate decision of the Collector either to restore the property to the Watandar or to confirm the possession of the person in actual possession thereof and make him liable to pay rent is not the exercise of a quasi-judicial function but is purely an administrative function. He contends that the Collector has to exercise his discretion one way or the other in the light of the policy of the Government and refers in this connection to the provisions of section 74 of the Watan Act. That section provides that the proceedings of the Collector shall be under the general control of the Commissioner and of the State Government. It may be borne in mind, however, that the Collector has been given various kinds of powers and is required to perform numerous duties under the Act, some of which are administrative in character. Since the decision taken by the Collector cannot properly be reached by exercising the appellate jurisdiction of the Commissioner and of the State Government, as the case may be, it was necessary to incorporate a general provision of this kind. The right of appeal conferred by section 77 extends only to decisions of the Collector or other authorities inferior to the Collector only in respect of decisions rendered by them after investigation recorded in writing and not against each and every decision rendered by them. Section 73 of the Act requires investigation to be recorded in writing in respect of orders made under certain parts of the Act. But apart from that provision there are other provisions like section 11 which provide for recording of reasons in writing which by implication also require investigation by the Collector. These provisions do not represent the totality of the Collector's power under the Act. Section 74 is thus clearly a provision which relates to orders made by the Collector without making any investigation in writing. This provision, therefore, does not assist the defendants.

1. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An.W.R. (S.C.) 156 : (1959) 1 S.C.R. 319. 2. (1963) 2 S.C.J. 599 : A.I.R. 1962 S.C. 1110.

Relying upon the decision in *Robinson & others v. Minister of Town and Country Planning*¹, and other decisions in that category Mr. Bindra contended that the Collector's quasi-judicial function ended with the declaration that the alienation was null and void and the decision pursuant to it which he took under section 12 thereof was purely administrative. Apart from the fact that the decision in *Robinson's case*¹, and other decisions taking similar view have been criticised in England (*see Griffith and Street, Principles of Administrative Law, page 168 and Robson, Justice and Administrative Law, page 533*) we may point out that the scheme of the statute which was considered in those decisions is different from that of Part II of the Watan Act which contains sections 11 and 12. The Town and Country Planning Act, 1944, with which the *Robinson's case*¹ deals confers a discretion on the Minister to accept wholly or with modification or reject a scheme prepared by a local authority. For a certain purpose that Act requires that the Minister has to cause an enquiry to be made by the Inspector or to make an enquiry himself and it has been held that such an enquiry is quasi-judicial in nature. After the enquiry is made it is for the Minister to exercise his authority under the Act and to accept wholly or in a modified form or reject the scheme. The Courts in England have held that proceedings under the Act are administrative in nature except to the limited extent that the enquiry is to be made in consonance with the principles of natural justice. Whether the view taken by the Courts in England is right or wrong it is sufficient to say that the nature of proceedings as well as what is required to be done under the English Act is something quite different from the nature of proceedings or what is required to be done under the relevant provisions of the Watan Act. Here, as Mr. Bindra himself concedes, the whole of the enquiry is not administrative in character. In fact its foundation is a *lis* between two parties : a Watandar out of possession and an alienee in possession of Watan property. When the final order is made by the Collector under section 12 this *lis* comes to an end and, therefore, there is no scope for the contention that any part of the proceeding is administrative in character. Even in an ordinary suit there are matters which are in the discretion of the Court, as for instance, awarding costs or fixing the rate of interest or of granting one relief instead of another. But merely because discretion is conferred on it in dealing with a particular matter, it cannot be contended that while exercising that discretion the Court acts otherwise than in the exercise of its judicial function. The proceedings before the Collector are of course not judicial but they are certainly quasi-judicial and where the Collector has to exercise a discretion for giving effect to his decision that a certain alienation is null and void it would not be permissible to say that all of a sudden his act ceases to be a quasi-judicial act and becomes an administrative one. The declaration made by him under section 11 that an alienation is null and void is by itself of little help to the Watandar and can be effectuated only after an order is made by the Collector under section 12. The provisions of these two sections are thus interlinked and it is difficult to conceive that as the proceedings progress their quasi-judicial nature degenerates into an administrative one. We may recapitulate that the Collector's order under section 12 is appealable but not so the order of the Minister. This, in our opinion, is an important distinction between the class of cases of which *Robinson's case*¹ is representative, and the present case.

We may refer to the decision in *Gullapalli Nageswara Rao's case*², where this Court has considered the decision in *Robinson's case*¹ as also that in *Franklin v. Minister of Town and Country Planning*³. While dealing with the argument advanced before it that the Government, in considering a scheme provided for road transport service under section 68 (c) of the Motor Vehicles Act, was discharging an administrative function, one of us (Subba Rao, J.) speaking for the majority of the Court has observed as follows :—

"A comparison of the procedural steps under both the Acts brings out in bold relief the nature of the enquiries contemplated under the two statutes. There, there is no *lis*, no personal hearing and

1. (1947) 1 All.E.R. 851.

S.C.R. 319.

2. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An.W.R. (S.C.) 156 : (1959) 1

3. L.R. (1948) A.C. 87.

even the public enquiry contemplated by a third party is presumably confined to the question of statutory requirements, or at any rate was for eliciting further information for the Minister. Here, there is a clear dispute between the two parties. The dispute comprehends not only objections raised on public grounds, but also in vindication of private rights and it is required to be decided by the State Government after giving a personal hearing and following the rules of judicial procedure. Though there may be some justification for holding, on the facts of the case before the House of Lords that that Act did not contemplate a judicial act—on that question we do not propose to express our opinion—there is absolutely none for holding in the present case that the Government is not performing a judicial act. Robson in 'Justice and Administrative Law', commenting upon the aforesaid decision, makes the following observation at page 533: 'It should have been obvious from a cursory glance at the New Towns Act that the rules of natural justice could not apply to the Minister's action in making an order, for the simple reason that the initiative lies wholly with him. His role is not to consider whether an order made by a local authority should be confirmed, nor does he have to determine a controversy between a public authority and private interests. The responsibility of seeing that the intention of Parliament is carried out is placed on him.'"

The aforesaid observations explain the principles underlying that decision and that principle cannot have any application to the facts of this case. In 'Principles of Administrative Law' by Griffith and Street, the following comment is found on the aforesaid decision: After considering the provisions of section 1 of the New Towns Act, 1946, the authors say—

"Like the town planning legislation, this differs from the Housing Acts in that the Minister is a party throughout. Further, the Minister is not statutorily required to consider the objections. It is obvious, as the statute itself states, that the creation of new towns is of national interest." (pages 349-350).

After concluding the above passage he observed:

"It is therefore clear that *Franklin's case*¹ is based upon the interpretation of the provisions of that Act and particularly on the ground that the object of the enquiry is to further inform the mind of the Minister and not to consider any issue between the Minister and the objectors. The decision in that case is of any help to decide the present case which turns upon the construction of the provisions of the Act. For the aforesaid reasons, we hold that the State Government's order under section 68-D is a judicial act."

As we have already said the scheme of certain sections of Part II of the Watan Act, including sections 11 and 12 also discloses that a judicial or quasi-judicial duty is imposed on the Collector to decide what is in effect a *lis* or *quasi lis* between the Watandar and the alienee of the Watan land. We must, therefore, hold that the whole process, including the order made under section 3 of the Act, is a quasi-judicial one and not administrative as contended for by the defendants-respondents.

Since the order made by the Collector under section 12 is not an administrative order but a quasi-judicial order it can be rectified or modified or set aside by the Commissioner in appeal or by the State Government in revision under section 79. It is not a kind of order which can be reached under section 74. Section 79 provides that the State Government may call for and examine the record of the proceedings of any officer for the purpose of satisfying itself as to the legality or propriety of any order passed and may reverse or modify the order as it seems fit or if it seems necessary may order a new enquiry. Now, in the year 1944 when the plaintiff moved the State Government by petition it returned the petition to him on 28th November, 1944, with the remark that he should apply to the Collector of Thana in the first instance and then if necessary to the Commissioner, Northern Division. The plaintiff was also informed that if he was not satisfied with the orders passed, he may approach the Government, presumably by preferring an application for revision. At the foot of the letter rule 11 of the Petition Rules was set out, the relevant portion of which runs thus:

"Government, however, will not receive a petition on any matter, unless it shall appear that the petitioner has already applied to the Chief Local Authority, and where such exists, to the controlling authority. The petitions to the chief local and to the controlling authorities or copies of them and the answers to or orders upon those petitions, in original, or copies of them, must be annexed to all petitions addressed to Government"

The plaintiff sent a reply to the aforesaid letter of the Government on 15th December, 1944, and enclosed with it a copy of the application made by him to the Collector, Thana, together with his order of 20th March, 1925 and said:

"In 1924 a revision application to the Collector of Thana was preferred. The Collector in his reply informed us on the authority of the Commissioner's decision that our case could not be considered (Order No. W.T.N. No. 5 of 1925 Copy enclosed Exhibit 7). It is against this order that the present appeal is being submitted. As the Collector has informed us on the authority of the Commissioner we think it is no use approaching the Commissioner again against the very decision already confirmed by him.

"I, therefore, approach Government with a request that a full and proper justice be done to my case which both on the question of facts and of law deserves careful consideration.

"With reference to paragraph 2 of your letter it may be mentioned that we have already approached the Collector of Thana and copy of his order was attached to my previous petition also. It is being resubmitted for your kind considerations."

After receiving this letter the Government caused a thorough enquiry to be made by the revenue officials in the presence of the parties and after giving them opportunity to adduce such evidence as they wished to. The proceedings of the subordinate officers, along with their reports, were in due course submitted to the Government and it was on the basis of this report that the Government made an order in October, 1946, restoring possession of the Watan lands to the plaintiff. It is true that the order does not say that it was passed under section 12 (a) of the Act read with section 79 thereof, but since both these provisions taken together give power to the Government to make an order of the kind which it made in October, 1946, its order must be held to have been made under those provisions. When an authority exercises its revisional powers it necessarily acts in a judicial or quasi-judicial capacity. Therefore, the Government's order of October, 1946, must be deemed to be a judicial or a quasi-judicial order. Such an order cannot be set aside or revised or modified just as an administrative order can be under section 74. Finality attaches to the Government's order under section 79 and in the absence of any express provision empowering it to review the order we are clear that the subsequent order made by the Government on 2nd May, 1947, is *ultra vires* and beyond its jurisdiction. We must, however, notice the contention raised, though faintly, by Mr. Bindra that the Government could not be deemed to have dealt with the matter in a quasi-judicial capacity under section 79 because the order revised by it was more than 20 years old. It is sufficient to say that no period of limitation is specified in the Act for preferring an application for revision. Of course, normally the Government would not interfere unless moved within reasonable time. But, what should be considered as a reasonable time in a particular case would be a matter entirely for the Government to consider. Apparently in this case the Government thought that it had strong reasons for interfering even after a long lapse of time and that is why it interfered.

Mr. Joshi who appears for the defendants 2 to 4 sought to support the decision of the High Court by resort to the provisions of section 4 (a) of the Bombay Revenue Jurisdiction Act, 1876. That section reads thus :

"Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters :

(a) claims against the Government relating to any property appertaining to the office of any hereditary officer appointed or recognised under Bombay Act No. III of 1874 or any other law for the time being in force,

He points out that in the plaint, the plaintiff has specifically sought relief against the State Government, and in this connection referred to prayers 1 and 2 of the plaint. In prayer No. 1 the plaintiff sought a declaration to the effect that the orders passed by the Government on 2nd May, 1947 and 1st March, 1949, are null and void and inoperative. In prayer No. 2 he asked that all the defendants be ordered to remove "their obstructions and hindrances" to the possession of the property which is the plaintiff's Watan property, and further ordered to deliver the possession of the property to him. It seems to us, however, that prayer No. 1 was really redundant because if the orders referred to therein were without jurisdiction and thus null and void it was not necessary to set them aside. Therefore, by making a prayer of that kind it cannot be said that the plaintiff had sought any relief against the State Government. As regards the second prayer it seems to us that the in-

clusion of the State Government therein was a slip because it is nobody's case that the Government is in possession of the lands or is actively obstructing the plaintiff in getting back its possession. We would, therefore, read the second prayer as referring to defendants 2 to 4 only. Reference was also made by learned counsel to the third prayer in which the plaintiff has asked for the accounts to be taken of the income obtained by the defendants from 6th January, 1942, till the date of suit and subsequently. Here again, though the defendants generally have been referred to, the plaintiff must be deemed to have meant only those defendants who were in actual physical possession of the property and earning income therefrom and enjoying it. It was, however, represented to us that during the period of possession defendants 2 to 4 have been crediting certain amount to the treasury for paying the remuneration of the Officiator and since they will be entitled to the credit for these amounts the Government was a necessary party. In our opinion that question has no relevance to prayer No. 3 made by the plaintiff. What he wants is the accounts of rents and profits and he is not concerned with any claim which defendants 2 to 4 may have against the Government. Therefore, considering all these prayers together we are of opinion that no relief was in fact sought against the Government and it was made only a formal party to the suit. If that view is correct the provisions of section 4 (a) of the Bombay Revenue Jurisdiction Act, 1876, will not stand in the way.

This Court, while dealing with an objection that the suit was barred by the provisions of section 4 (c) of the Bombay Revenue Jurisdiction Act has observed recently in *Ramrao Jankiram Kadam v. The State of Bombay*¹, as follows :—

“As to the applicability of section 4 (c), it would be noticed that resort to the Civil Courts is barred only as regards certain specified classes of suits in which the validity of sales for arrears of Land Revenue are impugned. The classes so specified are those in which the plaintiff seeks to set aside sales on account of irregularities *etc.* other than fraud. The provision obviously assumes that there is in existence a sale though irregular under which title has passed to the purchaser and that that sale has to be set aside, on grounds other than fraud, before the plaintiff can obtain relief. Where however there is only a purported sale which does not pass title and the suit is for recovery of possession of property ignoring such a sale, the provision and the bar that it creates have no application.”

Thus it would be clear that where something done or an order made is no act or order in law at all because it is without jurisdiction and null and void, the provisions of section 4 are not attracted. We may, however, refer to a decision of this Court in *Shrimant Sardar Bhujangarao Daulatrao Ghorpade v. Shrimant Malojirao Daulatrao Ghorpade and others*², which is claimed to support the contention of the defendants. In that case a suit was instituted by a Saranjamdar in which the representatives of two other branches of the Saranjam family and the province of Bombay were impleaded as defendants. It was alleged by the plaintiff that a certain resolution passed by the Government in the year 1936 modifying the previous resolutions passed by the Government in the years 1891 and 1932 by declaring that the portion of the estate held by the branches shall be entered as *de facto* shares and that each share shall be continuable hereditarily as if it were a separate Saranjam estate was *ultra vires* and for a further declaration that the plaintiff had the sole right to all privileges appertaining to the post of Saranjamdar and also sought an injunction restraining the defendants from doing any act in contravention of the plaintiff's right. The suit was held by this Court to be barred by section 4 of the Bombay Revenue Jurisdiction Act. This Court held that the suit was a suit against the Crown and also a suit relating to lands held as Saranjam within the meaning of section 4 of the Bombay Revenue Jurisdiction Act and that civil Courts had no jurisdiction to entertain it. Further this Court held that the plaintiff could not be given reliefs against defendants 1 and 2 alone as the right claimed against these defendants could not be divorced from the claim against the Government and considered separately. The decision in the *Province of Bombay v. Hormusji Maneklal*³ was cited before this Court in support of the contention that civil Courts have jurisdiction to decide whether the Government acted in excess of its powers. Bose J.,

1. C.A. No. 67 of 1956 decided on 26th September, 1962.

2. (1952) S.C.J. 125 : (1952) S.C.R. 402.

3. (1948) 1 M.L.J. 134 : L.R. 74 I.A. 103.

who delivered the judgment of the Court, however, expressed the opinion that that decision would not apply and then he observed as follows :—

“As pointed out by Strangman K.C., on behalf of the plaintiff-respondent, ‘authorised’ must mean ‘duly authorised’, and in that particular case the impugned assessment would not be duly authorised if the Government Resolution of 11th April, 1930, purporting to treat the agreement relied on by the respondent as cancelled and authorising the levy of the full assessment was *ultra vires* under section 211 of the Land Revenue Code. Thus, before the exclusion of the Civil Court’s jurisdiction under section 4 (b) could come into play, the Court had to determine the issue of *ultra vires*. Consequently, their Lordships held that that question was outside the scope of the bar. But the position here is different. We are concerned here with section 4 (a) and under that no question about an authorised act of Government arises. The section is general and bars all ‘claims against the Crown relating to lands held as Saranjam.’ That is to say, even if the Government’s act in relation to such lands was *ultra vires*, a claim impugning the validity of such an act would fall within the scope of the exclusion in clause (a) provided it *relates* to such land.”

It is settled law that the civil Courts have the power and jurisdiction to consider and decide whether a tribunal of limited jurisdiction has acted within the ambit of the powers conferred upon it by the statute to which it owes its existence or whether it has transgressed the limits placed on those powers by the Legislature. The decision in *Hormusji Maneklal’s case*¹, proceeds on the basis of this rule. There are a number of decisions in the books in which this principle has been stated and followed. One such decision is *The Secretary of State v. Mask & Co.*², in which the Judicial Committee has observed thus :

“It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.” (page 614).

We do not think that it was the intention of this Court to overrule a rule which has been firmly established. Had that been the intention, we would have found a fuller discussion of the question.

In the course of the judgment Bose, J., pointed out that there was difference of opinion in the Bombay High Court as to whether section 4 is attracted if the only relief sought against the Government is a declaration and expressed agreement with the view that section 4 applies even where the relief sought against Government is only a declaration. As we have pointed out this part of the judgment does not help the defendants’ case because no declaration against the Government was at all necessary. Indeed the plaintiff could ignore the two orders complained of by him as being without jurisdiction and null and void and proceed to seek the relief of possession on the strength of the earlier order made by the Government in October, 1946.

For these reasons we reverse the decision of the High Court which affirmed that of the District Court and restore the decision of the trial Court. Costs throughout will be borne by the defendants.

K.L.B.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Fateh Chand

.. Appellant*

v.

Balkishan Dass

.. Respondent.

Contract Act (IX of 1872), section 74—Applicability—Claim to forfeit amounts paid towards price fixed if vendee fails to get sale deed registered by a particular date—Duty of Court to allow only reasonable compensation.

In an agreement for sale of land for Rs. 63,000 it was provided that if on account of any reason the vendee fails to get the sale deed registered by the 1st June, 1949, the earnest of Rs. 1,000 and the

1. L.R. 74 I.A. 103 : (1948) 1 M.L.J. 134.

I.L.R. 1940 Mad. 599 (614).

2. L.R. 67 I.A. 222 : (1940) 1 M.L.J. 140 :

* C.A. No. 287 of 1960.

sum of Rs. 24,000 paid by the vendee on his being put into possession shall be deemed to be forfeited and the agreement cancelled. On a claim by the vendor to forfeit those amounts.

Held : It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract. The claim to forfeit the amount of Rs. 24,000, may be adjudged in the light of section 74 of the Contract Act which enacts a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty. The covenant for forfeiture of Rs. 24,000 is manifestly a stipulation by way of penalty. Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by section 74. The Court has jurisdiction to award such sum only as it considers reasonable not exceeding the amount specified in the contract as liable to forfeiture.

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties pre-determined or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of the breach of contract. The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

Abdul Gani & Co. v. Trustees of the Port of Bombay, I.L.R. (1952) Bom. 747 and *Natesa Aiyar v. Appavu Padayachi*, I.L.R. 3 Mad. 178, overruled.

Appeal from the Judgment and Decree dated the 22nd August, 1957, of the Punjab High Court (Circuit Bench) at Delhi in Civil Regular First Appeal No. 37-D of 1952.

M.C. Setalvad, Attorney-General for India (*M.L. Bagai*, *S.K. Mehta* and *K.L. Mehta*, Advocates with him), for Appellant.

Mohan Behari Lal, Advocate, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—By a registered deed of lease dated 19th, May 1927—which was renewed on 30th January, 1947—the Delhi Improvement Trust granted lease hold rights for 90 years to one Dr. M.M. Joshi in respect of a plot of land No. 3, 'E' Block, Qarol Bagh, Delhi, admeasuring 2433 sq. yards. Dr. Joshi constructed a building on the land demised to him. Chandrawati, widow of Dr. Joshi, as guardian of her minor son Murli Manohar, by sale-deed dated 21st April, 1947, sold the leasehold rights in the land together with the building to Lala Balkrishan Das—who will hereinafter be referred to as 'plaintiff'—for Rs. 63,000. By an agreement dated 21st March, 1949, the plaintiff contracted to sell his rights in the land and the building to Seth Fateh Chand—hereinafter called 'the defendant.' It was recited in the agreement that the plaintiff agreed to sell the building together with "pattadari" rights appertaining to the land admeasuring 2433 sq. yards for Rs. 1,12,500, and that Rs. 1,000 were paid to him as earnest money at the time of the execution of the agreement. The conditions of the agreement were :

"(1) I, the executant, shall deliver the actual possession, i.e. complete vacant possession of kothi (bungalow) to the vendee on the 30th March, 1949, and the vendee shall have to give another cheque for Rs. 24,000 to me : out of the sale price.

(2) Then the vendee shall have to get the sale (deed) registered by the 1st June, 1949. If, on account of any reason, the vendee fails to get the said sale-deed registered by the 1st June, 1949, then this sum of Rs. 25,000 (twenty-five thousand) mentioned above shall be deemed to be forfeited and the agreement cancelled. Moreover, the vendee shall have to deliver back the complete vacant possession of the kothi (bungalow) to me, the executant. If due to certain reason, any delay takes place on my part in the registration of the sale-deed, by the 1st June, 1949, then I, the executant, shall be liable to pay a further sum of Rs. 25,000 as damages, apart from the aforesaid sum of Rs. 25,000 to the vendee and the bargain shall be deemed to be cancelled."

The southern boundary of the land was described in the agreement as "Bungalow of Murli Manohar Joshi."

On 25th March, 1949, the plaintiff received Rs. 24,000 and delivered possession of the building and the land in his occupation to the defenant, but the sale of the property was not completed before the expiry of the period stipulated in the agreement. Each party blamed the other for failing to complete the sale accord-

ing to the terms of the agreement. Alleging that the agreement was rescinded because the defendant had committed default in performing the agreement and the sum of Rs. 25,000 paid by the defendant stood forfeited, the plaintiff in an action filed in the Court of the Subordinate Judge, Delhi, claimed a decree for possession of the land and building described in the plaint, and a decree for Rs. 6,500 as compensation for use and occupation of the building from 25th March, 1949 to 24th January, 1950, and for an order directing enquiry as to compensation for use and occupation of the land and building from the date of the institution of the suit until delivery of possession to the plaintiff. The defendant resisted the claim contending *inter alia* that the plaintiff having committed breach of the contract could not forfeit the amount of Rs. 25,000 received by him nor claim any compensation. The trial Judge held that the plaintiff had failed to put the defendant in possession of the land agreed to be sold and could not therefore retain Rs. 25,000 received by him under the contract. He accordingly directed that on the plaintiff depositing Rs. 25,000 less Rs. 1,400 (being the amount of mesne profits prior to the date of the suit) the defendant do put the plaintiff in possession of the land and the building, and awarded to the plaintiff future mesne profits as the rate of Rs. 140 per mensem from the date of the suit until delivery of possession or until expiration of three years from the date of the decree whichever event first occurred. In appeal the High Court of Punjab modified the decree passed by the trial Court and declared "that the plaintiff was entitled to retain out of Rs. 25,000 paid by the defendant under the sale agreement, a sum of Rs. 11,250" being compensation for loss suffered by him and directed that the plaintiff do get from the defendant compensation for use and occupation at the rate of Rs. 265 per mensem. The defendant has appealed to this Court with certificate under Article 133 (1) (a) of the Constitution.

The first question which falls to be determined in this appeal is as to who committed breach of the contract. The plaintiff's case as disclosed in his pleading and evidence was that he had agreed to sell to the defendant the lease-hold rights in the land and building thereon purchased by him from Murli Manohar Joshi by sale deed dated 21st April, 1947, that at the time of execution of the agreement the defendant had inspected the sale deed and the lease executed by the Improvement Trust dated 30th January, 1947 and the "sketch plan" annexed to the lease, that the plaintiff had handed over to the defendant a copy of that plan and had put the defendant in possession of the property agreed to be sold, but the defendant despite repeated requests failed and neglected to pay the balance remaining due by him and to obtain the sale deed in his favour. The defendant's case on the other hand was that the plaintiff had agreed to sell the area according to the measurement and boundaries in the plan annexed to the lease granted by the Improvement Trust and had promised to have the southern boundary demarcated and to have a boundary wall built, that at the time of the execution of the agreement of sale the plaintiff did not show him the sale deed by which he had purchased the property, nor the lease obtained from the Improvement Trust in favour of Dr. Joshi nor even the "sketch plan", that the plaintiff had given him a copy of the "sketch plan" not at the time of the execution of the agreement, but three or four days after he was put in possession of the premises and that on measuring the site in the light of the plan he discovered that there was a "shortage on the southern side opposite to Rohtak Road", that thereupon he approached the plaintiff and repeatedly called upon him to put him in possession of the land as shown in the plan and to get the boundary wall built in his presence but the plaintiff neglected to do so. We have been taken through the relevant evidence by counsel and we agree with the conclusion of the High Court that the defendant and not the plaintiff committed breach of the contract.

The defendant's case is founded primarily on two pleas :

(i) that the plaintiff offered to sell land not according to the description in the written agreement, but according to the plan appended to the Improvement Trust lease, and that he—the defendant—accepted that offer, and

(ii) the plaintiff had undertaken to have the southern boundary demarcated and a boundary wall built thereon.

If the case of the defendant be true, it is a singular circumstance that those covenants are not found incorporated in the written agreement nor are they referred to in any document prior to the date fixed for completion of the sale. The defendant was put in possession on 25th March, 1949 and he paid Rs. 24,000 as agreed. If the plaintiff did not put the defendant in possession of the entire area which the latter had agreed to buy, it is difficult to believe that the defendant would part with a large sum of money which admittedly was to be paid by him at the time of obtaining possession of the premises, and in any event he would have immediately raised a protest in writing that the plaintiff had not put him in possession of the area agreed to be delivered. It is implicit in the plea of the defendant that he knew that the southern boundary was irregular and that the plaintiff was not in possession of the area agreed to be sold under the agreement. Why then did the defendant not insist that the terms pleaded by him be incorporated in the agreement? We find no rational answer to that question: and none has been furnished. The story of the defendant that he agreed to purchase the land according to 'the measurement and boundaries' in the Improvement Trust Plan without even seeing that plan, is impossible of acceptance.

It is common ground that according to this plan the land demised was rectangular in shape admeasuring $140' \times 160'$ though the conveyance was in respect of 2433 sq. yards only. Manifestly if the land conveyed to the predecessor-in-interest of the plaintiff was a perfect rectangle the length of the boundaries must be inaccurate, for the area of a rectangular plot of land $140' \times 160'$ would be 2488 sq. yards and 8 sq. feet and not 2433 sq. yards. The plaintiff had purchased from his predecessor-in-interest land admeasuring 2433 sq. yards and by the express recital in the agreement the plaintiff agreed to sell that area to the defendant. At the request of the plaintiff the trial Court appointed a Commissioner for measuring the land of which possession was delivered to the defendant, and according to the Commissioner the land "admeasured $141\frac{1}{4} \times 157\frac{1}{8}$ feet". The Commissioner found that two constructions—a latrine and a garage—on the adjacent property belonging to Murli Manohar Joshi "broke the regular line of the southern boundary." The fact that the southern boundary was irregular must have been noticed by the defendant at the time of the agreement of sale and in any event soon after he obtained possession the defendant did not raise any objections in that behalf. His story that he had orally called upon the plaintiff repeatedly to put him in possession of the land as shown in the Improvement Trust plan cannot be believed. The defendant's case that a part of the land agreed to be conveyed was in the possession of Murli Manohar Joshi was set up for the first time by the defendant in his letter dated 17th June, 1949. On 1st June, 1949, the defendant informed the plaintiff by a telegram that the latter was responsible for damages as he had failed to complete the contract. The plaintiff by a telegram replied that he was ready and willing to perform his part of the contract and called upon the defendant to obtain a sale deed. The defendant then addressed a letter on 9th June, 1949 to the plaintiff informing him that the latter had to get the document executed and registered after giving clear title by 1st June, 1949. To that letter the plaintiff replied that the defendant had inspected the title deeds before he agreed to purchase the property and had satisfied himself regarding the plaintiff's title thereto and that the defendant had never raised any complaint about any defect in the title of the plaintiff. The defendant's Advocate replied by letter dated 17th June, 1949:

"This is true that my client paid Rs. 25,000 and got possession of the kothi on the clear understanding that your client has clear title of the entire area mentioned in the agreement of sale and sketch map attached to it. Long before 1st June, my client noticed that a certain area of the Kothi under sale is under the possession of Shri Murli Manohar Joshi on which his garage stands. Again on the same side Shri Murli Manohar Joshi has got latrines and there is clear encroachment on the land included in the sale. It was clearly understood at the time of bargain that vacant possession of the entire area under sale will be given by your client. My client was anxious to put a wall on the side of Shri Murli Manohar Joshi and when he was actually starting the work this difficulty of garage and latrine came in. Your client was approached * * *"

One thing is noticeable in this letter: according to the defendant, there was a "sketch-plan" attached to the agreement of sale, and that it was known to the

parties at the time of the agreement that a part of the land agreed to be sold had been encroached upon, before the agreement by Murli Manohar Joshi. If there had been an "understanding" as suggested by the defendant and if the plaintiff had, in spite of demands made in that behalf by the defendant, failed to carry out the agreement or understanding, we would have expected this version to be set up in the earliest communication and not reserved to be set up as a reply to the plaintiff's assertion that the defendant had never complained about any defect in the title of the plaintiff. According to the written agreement the area agreed to be conveyed was 2433 sq. yards and the land was on the south bounded by the bungalow of Murli Manohar Joshi. It is common ground that the defendant was put in possession of an area exceeding 2433 sq. yards, and the land is within the four boundaries set out in the agreement. But the defendant sought to make out the case at the trial that he had agreed to purchase land according to the Improvement Trust plan—a fact which is not incorporated in the agreement, and which has not been mentioned even in the letter dated 17th June, 1949. The assertions made by the defendant in his testimony before the Court, show that not much reliance can be placed upon his word. He stated that the terms of the contract relating to forfeiture of Rs. 25,000 paid by him in the event of failure to carry out the terms of the contract were never intended to be acted upon and were incorporated in the agreement at the instance of the writer who wrote the deed. This plea was never raised in the written statement and the writer of the deed was not questioned about it. The defendant is manifestly seeking to add oral terms to the written agreement which have not been referred to in the correspondence at the earliest opportunity. We therefore agree with the High Court that the plaintiff carried out his part of the contract to put the defendant in possession of the land agreed to be sold, and was willing to execute the sale-deed, but the defendant failed to pay the balance of the price, and otherwise to show his willingness to obtain a conveyance.

The claim made by the plaintiff to forfeit the sum of Rs. 25,000 received by him from the defendant must next be considered. This sum of Rs. 25,000 consists of two items—Rs. 1,000 received on 21st March, 1949, and referred to in the agreement as 'earnest money' and Rs. 24,000 agreed to be paid by the defendant to plaintiff as "out of the sale price" against delivery of possession and paid by the defendant to the plaintiff on 25th March, 1949, when possession of the land and building was delivered to the defendant. The plaintiff submitted that the entire amount of Rs. 25,000 was to be regarded as earnest money, and he claimed to forfeit it on the defendant's failure to carry out his part of the contract. This part of the case of the plaintiff was denied by the defendant.

The Attorney General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs. 1,000 which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000 out of the amount paid by the defendant was a stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs. 24,000 was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1,000 as earnest money, and that amount was paid by the defendant. The amount of Rs. 24,000 was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price". If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence.

It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract.

The claim made by the plaintiff to forfeit the amount of Rs. 24,000 may be adjudged in the light of section 74 of the Indian Contract Act, which in its material part provides :—

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for.”

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English Common Law in distinguishing between stipulations providing of payment of liquidated damages and stipulations in the nature of penalty. Under the Common Law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract *in terrorem* is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English Common Law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

The second clause of the contract provides that if for any reason the vendee fails to get the sale deed registered by the date stipulated, the amount of Rs. 25,000 (Rs. 1,000 paid as earnest money and Rs. 24,000 paid out of the price on delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for forfeiture of Rs. 24,000 is manifestly a stipulation by way of penalty.

Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to, all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated ; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all had resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to *receive* from the party who has broken the contract reasonable compensation and not the right to *forfeit* what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression “the contract contains any other stipulation by way of penalty” comprehensively applies to every

covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.

In *Abdul Gani & Co., v. Trustees of the Port of Bombay*¹, the Bombay High Court observed as follows :—

“It will be noticed that the sum which is named in the contract either as penalty or as liquidated damages is a sum which has not already been paid but is to be paid in case of a breach of the contract. With regard to the stipulation by way of penalty, the Legislature has chosen to qualify ‘stipulation’ as ‘any other stipulation’, indicating that the stipulation must be of the nature of an amount to be paid and not an amount already paid prior to the entering into of the contract. The section further provides that a party complaining of a breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated for. Therefore, the section clearly contemplates that the party aggrieved has to receive from the party in default some amount or something in the nature of a penalty : it clearly rules out the possibility of the amount which has already been received or the penalty which has already been provided for.”

In *Natesen Aiyar v. Appavu Padayachi*², the Madras High Court seems to have held that section 74 applies where a sum is named as penalty to be paid in future in case of breach, and not to cases where a sum is already paid and by a covenant in the contract it is liable to forfeiture.

In these cases the High Courts appear to have concentrated upon the words “to be paid in case of such breach” in the first condition in section 74 and did not consider the import of the expression “the contract contains any other stipulation by way of penalty”, which is the second condition mentioned in the section. The words “to be paid” which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression “if the contract contains any other stipulation by way of penalty” widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression, “contract contains any other stipulation by way of penalty” is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party ; it merely declares the law that notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The Court has to adjudge in every case reasonable compensa-

1. I.L.R. 1952 Bom. 747.

2. I.L.R. 3 Mad. 178.

tion to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs. 25,000 consisting of Rs. 1,000, paid as earnest money and Rs. 24,000 paid as a part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs. 1,000 which was paid as earnest money. We cannot however agree with the High Court that 13 per cent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten per cent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs. 1,000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs. 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs. 1,000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs. 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out of possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken into account in determining damages for this purpose. The decree passed by the High Court awarding Rs. 11,250 as damages to the plaintiff must therefore be set aside.

The other question which remains to be determined relates to the amount of mesne profits which the plaintiff is entitled to receive from the defendant who kept the plaintiff out of the property after the bargain had fallen through. It is common ground that the defendant is liable for retaining possession to pay compensation from 1st June, 1949, till the date of the suit and thereafter under Order 20, rule 12(c), Civil Procedure Code, till the date on which possession was delivered. The trial Court assessed compensation at the rate of Rs. 140 per mensem. The High Court awarded compensation at the rate of Rs. 265 per mensem. In arriving at this rate the High Court adopted a highly artificial method. The High Court observed that even though the agreement for sale of the property was for a consideration of Rs. 1,12,500 the plaintiff had purchased the property in 1947 for Rs. 63,000 and that at the date of the suit the amount could be regarded as "the value for which the property could be sold at any time." The High Court then thought that the proper rate of compensation for use and occupation of the house by the defendant when he refused to give up possession after failing to complete the contract should have some relation to the value of the property and not to the price agreed as sale price between the parties, and computing damages at the rate of five per cent on the value of the property they held that Rs. 3,150 was the annual loss suffered by the plaintiff by being kept out of possession, and on that footing awarded mesne profits at the rate of Rs. 265 per mensem prior to the date of the suit and thereafter. The plaintiff is undoubtedly entitled to mesne profits from the defendant, and "mesne profits" as defined in section 2 (12) of the Code of Civil Procedure are profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but do not include profits due to improvements made by the person in wrongful possession. The normal measure of mesne profits is therefore the value of the user of land to the person in wrongful possession. The assessment made by the High Court of

compensation at the rate of five per cent of what they regarded as the fair value of the property is based not on the value of the user, but on an estimated return on the value of the property, cannot be sustained. The Attorney-General contended that the premises were governed by the Delhi and Ajmer-Merwara Rent Control Act XIX of 1947 and nothing more than the standard rent of the property assessed under that Act could be awarded to the plaintiff as damages. Normally a person in wrongful possession of immovable property has to pay compensation computed on the basis of profits he actually received or with ordinary diligence might have received. It is not necessary to consider in the present case whether mesne profits at a rate exceeding the rate of standard rent of the house may be awarded, for there is no evidence as to what the 'standard rent' of the house was. From the evidence on the record it appears that a tenant was in occupation for a long time before 1947 of the house in dispute in this appeal and another house for an aggregate rent of Rs. 180 per mensem, and that after the house in dispute was sold, the plaintiff received rent from that tenant at the rate of Rs. 80 per mensem, and to the vendor of the plaintiff at the rate of Rs. 106 per mensem. But this is not evidence of standard rent within the meaning of Delhi and Ajmer-Merwara Rent Control Act XIX of 1947.

The Subordinate Judge awarded mesne profits at the rate of Rs. 140 per mensem and unless it is shown by the defendant that that was excessive we would not be justified in interfering with the amount awarded by the Subordinate Judge. A slight modification, however, needs to be made. The plaintiff is not only entitled to mesne profits at the monthly rate fixed by the trial Court, but is also entitled to interest on such profits *vide* section 2 (12) of the Code of Civil Procedure. We, therefore, direct that the mesne profits be computed at the rate of Rs. 140 per mensem from 1st June, 1949, till the date on which possession was delivered to the plaintiff (such period not exceeding three years from the date of decree) together with interest at the rate of six per cent on the amount accruing due month after month.

The decree passed by the High Court will therefore be modified. It is ordered that the plaintiff is entitled to retain out of Rs. 25,000 only Rs. 1,000 received by him as earnest money, and that he is entitled to compensation at the rate of Rs. 140 per mensem and interest on that sum at the rate of six percent as it accrues due month after month from 1st June, 1949, till the date of delivery of possession, subject to the restriction prescribed by Order 20, rule 12 (1) (c) of the Code of Civil Procedure. Subject to these modifications, this appeal will be dismissed. In view of the divided success, we direct that the parties will bear their own costs in this Court.

K.S.

*Subject to modification of decree.
Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

New Central Jute Mills Co., Ltd., and others

.. *Petitioners**

v.

The State of West Bengal and others

.. *Respondents*

Advocates-General, Andhra Pradesh, Madhya Pradesh and Maharashtra

.. *Interveners.*

Stamp Act (II of 1899) (as amended in Uttar Pradesh)—Sections 3 and 19-A—Scope—Mortgage executed in Uttar Pradesh relating to property in West Bengal bearing stamps over-printed with name of West Bengal—Uttar-Pradesh Officer if can hold not to be duly stamped.

In amending the Stamp Act what the Uttar Pradesh State Legislature (like other State Legislatures) substantially did was to treat the particular State as equivalent to "India". Thus after the amendment by the Uttar Pradesh Legislature the position in law is that execution of an instrument in Uttar

* Petition No. 13 of 1962.

Pradesh is made the primary dutiable event and liability to stamp duty arises on such execution. Apart from that, liability also arises where the instrument though executed out of Uttar Pradesh relates to property situated or any matter or thing done or to be done in Uttar Pradesh and is received in Uttar Pradesh. After the amendment of the Act the liability on execution of the document can no longer be said to arise generally in India but must be held to arise in the particular State, where the instrument is executed. Such instrument can be said to be duly stamped only if it bears stamps of the amount and description in accordance with the law of the State concerned—the law including not only the Act but also the Rules framed under the Act.

Section 19-A of the Uttar Pradesh Act in terms applies only to an instrument which after becoming chargeable in any State outside Uttar Pradesh becomes chargeable in Uttar Pradesh with a higher rate of duty. [Where the rate of duty in Uttar Pradesh is same or even lower, no further duty is payable on such an instrument and where it is higher it will require to be stamped only with the excess and that in accordance with the law and Rules in force in Uttar Pradesh].

In the instant case the mortgage deed was executed in Uttar Pradesh, though it related to property in West Bengal and received in that State for registration. The first dutiable event was the execution, which took place in Uttar Pradesh the second dutiable event was the receipt in West Bengal. When it came before the officers of Uttar Pradesh for decision whether it was duly stamped or not, the officers of Uttar Pradesh were bound to hold that the instrument was not duly stamped as it did not bear Uttar Pradesh stamps. The fact that the instrument had been stamped in accordance with the law of West Bengal could not justify a conclusion that it had been stamped in accordance with the law in force in India.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Right.

C. K. Daphtary, Solicitor-General of India (*B. P. Maheshwari*, Advocate with him), for Petitioners.

B. Sen, Senior Advocate (*S. C. Mazumdar*, Advocate for *P. K. Bose*, Advocate, with him), for Respondent No. 1.

C. B. Agarwal and *K. S. Hajela*, Senior Advocates (*C. P. Lal*, Advocate, with them), for Respondents Nos. 2 to 6.

T. V. R. Tatachari and *P. D. Menon*, Advocates, for Intervener No. 1.

B. Sen, Senior Advocate (*S. P. Varma*, Advocate for *I. N. Shroff*, Advocate with him), for Intervener No. 2.

B. Sen, Senior Advocate (*M. S. K. Sastri* and *R. H. Dhebar*, Advocates, with him) for Intervener No. 3.

The Judgment of the Court was delivered by

Das Gupta, J.—Where an instrument executed in Uttar Pradesh and consequently liable to stamp duty under the Indian Stamp Act as amended in Uttar Pradesh but relating to property in West Bengal bears stamps over-printed with the name of West Bengal comes before a public officer of Uttar Pradesh, is such officer right in holding that the instrument is not duly stamped in as much as it does not bear stamps over-printed with the name of Uttar Pradesh? That is the principal question which has arisen in this petition under Article 32 of the Constitution.

The first Petitioner, a Company incorporated under the Indian Company's Act, with its registered office at Calcutta, is the owner of a factory at Varanasi in the State of Uttar Pradesh. The petitioners Nos. 2 and 3 are the shareholders of the first petitioner Company. The State of Uttar Pradesh having agreed to advance a loan of Rs 1,45,00,000 on the mortgage of the Company's assets at its jute mills at Budge Budge and at Ghosuri, all situated in West Bengal, the deed of mortgage was executed at Lucknow in the State of Uttar Pradesh on 22nd March, 1957. To this deed the first petitioner affixed stamps of the value of Rs.1,08,751 purchased from the Collector of Stamps, Calcutta. It was duly registered at Calcutta on 5th April, 1957. Thereafter, on 23rd March, 1957 by a deed executed between the first petitioner and the State of Uttar Pradesh a part of the mortgage property in West Bengal was released and in its place and stead a part of some properties of Uttar Pradesh were substituted. The deed of substitution was duly stamped and registered in Uttar Pradesh. No objection was then taken to the stamp affixed on the original deed of mortgage. In 1960 the first petitioner made a request to the State of Uttar Pradesh to release a further part of the mortgage pro-

perties included in the original mortgage deed and to accept in their place and stead the assets and properties of the Company's factory at Varanasi as substituted security. A draft deed for the substitution was sent by the first petitioner to the Collector of Varanasi for ascertaining the stamp duty payable on it and for getting the benefits of reduced rates of duty applicable in case of substitution of security. The Collector referred the matter to the Board of Revenue for adjudication of the Stamp duty on the document for substitution. Ultimately, the Board of Revenue, Uttar Pradesh, decided that as the original document had been executed at a place within Uttar Pradesh, it must bear stamps issued by the Uttar Pradesh Government. It rejected the argument that the document of 23rd March, 1957, was not an instrument and therefore could bear the stamps issued by the West Bengal Government. The Board of Revenue held that the Company was liable to pay Rs. 1,74,000 as stamps duty on the document dated 23rd March, 1957, before it can avail of the concessional rate provided for in substituted security. Thereafter, the Collector of Varanasi, by a letter dated, 8th September, 1961, informed the first petitioner that the draft deed submitted by it was a substituted security chargeable under Article 40 (c) of Schedule 1-B of the Uttar Pradesh Stamp Amendment Act, 1958, with a duty of Rs. 7,554 provided the original mortgage deed of 22nd March, 1957 was "first got properly stamped by payment of deficit duty of Rs. 1,74,000". The letter ended with a request for deposit of the deficit of Rs. 1,74,000 on the mortgage deed of 22nd March, 1957, and also for deposit of Rs. 7,554 for the deed of substitution to be executed. This letter from the Collector was followed by a letter dated 17th November, 1961, from the Tehsildar, Chandauli, Varanasi, demanding payment of Rs. 1,74,000 within a week of the receipt of the letter. On 30th November, the first petitioner replied to this letter asking for a month's time. The present petition was filed on 22nd December, 1961.

Primarily, the petitioner's case is that under the provisions of the Stamp Act a document cannot be said to be unstamped unless it comes within the mischief of section 15 of the Act and so the Board of Revenue was wrong in holding that the mortgage deed of 22nd March, 1957, could not be said to be properly stamped unless it bore stamps of the value of Rs. 1,74,000 issued by the Uttar Pradesh Government. The order was also challenged as illegal on the ground that the petitioner had already paid stamp duty in West Bengal to the extent of Rs. 1,08,751 "after proper adjudication thereof by the Collector of Stamps, Calcutta, based on the provisions of a circular dated 2nd August, 1954, issued by the State of West Bengal." Rule 3 of the Stamp Rules as framed by the Uttar Pradesh Government (which provided that duty has to be paid by means of stamps over-printed with the words "Uttar Pradesh" or the letters "U. P.") was also attacked as unconstitutional on the ground that it constituted an unreasonable restriction on the petitioner's fundamental rights under Article 19 (1) (g) of the Constitution. Alternatively, it was contended that the circular of the West Bengal Government dated 2nd August, 1954, was null and void and the State of West Bengal had "illegally exacted the sum of Rs. 1,08,751 from the petitioner without any authority of law in that behalf" and had infringed the fundamental rights of the petitioner under Articles 19 (1) (f) and 19 (1) (g) of the Constitution.

The petitioner asks for (i) a writ of *certiorari* for the quashing of the order of the Board of Revenue dated 11th August, 1961; (ii) a writ in the nature of *mandamus* directing respondents 3, 4 and 5, viz., Mr. Bhargava, Member, Board of Revenue, Uttar Pradesh, the Board of Revenue, Uttar Pradesh and the Collector of Varanasi to forbear from acting on the basis of the order dated 11th August, 1961; (iii) alternatively, a writ in the nature of *mandamus* directing the respondent No. 1, the State of West Bengal to refund to the petitioner the sum of Rs. 1,08,751.

The petition was resisted by the State of West Bengal as also by the other respondents, i.e., the State of U. P. and its officers.

On behalf of the State of Uttar Pradesh it was urged that the Board's order dated 11th August, 1961, was in accordance with law. It appears from paragraph

19 of the counter-affidavit filed on behalf of the respondents 2 to 6 that the document in question, *i.e.*, the original mortgage deed dated 22nd March, 1957, was impounded by the Inspector of Stamps, on 9th August, 1961.

The State of West Bengal denied that the circular dated August 2, 1954 was illegal and also that "the State of West Bengal had illegally exacted the sum of Rs. 1,08,751 without authority of law." In view of the importance of the questions raised, notices were issued to all the Advocates-General of the States and Advocates-General of several States appeared before us through their counsel.

The learned Solicitor-General, who appeared in support of the petitioner, did not press the contention against the State of West Bengal. The only point seriously pressed by him was that on a proper interpretation of the provisions of the Stamp Act and the Rules framed thereunder it would be wrong to hold that the document required to be stamped with the stamps purchased from U. P. Government. The learned Solicitor-General did not address us on the question as regards the amount of the stamp duty.

There cannot be any doubt that when it becomes necessary for any public officer of a State—using that word to mean an officer in charge of a public office—to decide whether an instrument is or is not "duly stamped" the law he has to apply is the Indian Stamp Act in the light of the appropriate modifications made by the State Legislature. So, when the Uttar Pradesh public officer had to decide in the present case whether the original mortgage deed was or was not "duly stamped" they had to examine for the purpose the Indian Stamp Act as it stood after its amendment by the Uttar Pradesh Legislature. Section 3 of the Stamp Act creates a liability for stamp duty. Section 3 after its amendment by the U. P. Legislature stands thus :—

"3. Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor, respectively, that is to say :—

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in the States on or after the first day of July, 1899 ;

(b) every bill of exchange (payable otherwise than on demand) or promissory note drawn or made of the States on or after that day and accepted or paid, presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in the States ; and

(c) every instrument (other than a bill of exchange, or promissory note) mentioned in that Schedule which, not having been previously executed by any person is executed out of the States on or after that day, relates to any property situate, or to any matter or thing done or to be done, in the States and is received in the States :—

Provided that except as otherwise expressly provided in this Act, and notwithstanding anything contained in clauses (a) and (c) of this section or in Schedule I or I-A the following instruments shall subject to the exemptions contained in Schedule 1-A or 1-B be chargeable with duty of the amount indicated in Schedule 1-A or 1-B as the proper duty therefor respectively, that is to say—

(aa) every instrument mentioned in Schedule 1-A or 1-B which not having been previously executed by any person was executed in Uttar Pradesh—

(i) in the case of instruments mentioned in Schedule 1-A on or after the date on which the U.P. Stamp (Amendment) Act, 1948, came into force, and

(ii) in the case of instruments mentioned in Schedule 1-B on or after the date on which the U.P. Stamp (Amendment) Act, 1952, comes into force.

(bb) every instrument mentioned in Schedule 1-A or 1-B which not having been previously executed by any person, was executed out of Uttar Pradesh—

(i) in the case of instruments mentioned in Schedule 1-A on or after the date on which the U.P. Stamp (Amendment) Act, 1948, came into force and

(ii) in the case of instruments mentioned in Schedule 1-B on or after the date the U.P. Stamp, (Amendment) Act, 1952, comes into force, and relates to any property situated, or to any matter or thing done or to be done in Uttar Pradesh and is received in Uttar Pradesh :

Provided also that no duty shall be chargeable in respect of

(1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument ;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act, XIX of 1838, or the Indian Registration of Ships Act, 1841, (X of 1841), as amended by subsequent Acts."

Another important change in the legal position was effected by framing Rules under the Act. While section 74 empowers the State Government to make Rules relating to the sale of stamps, section 75 empowers the Government generally to make Rules "to carry out generally the purposes of the Act." Section 76 provides that all Rules made under the Act shall be published in the official gazette and on such publication shall have effect as if enacted by the Act. Of the Rules framed by the Uttar Pradesh Government it is necessary to consider in the present case rule 3 which is in these words :

"Except as otherwise provided by the Stamp Act or by these Rules—

(i) all duties with which an instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamp issued by the Government for the purposes of the Act, and

(ii) a stamp which by any word or words on the face of it is appropriated to any particular kind of instrument shall not be used for an instrument of any other kind.

(2) There shall be two kinds of stamps for indicating the payment of duty with which instruments are chargeable namely :—

(a) impressed stamps over-printed with the words "Uttar Pradesh" or the letters "U.P." and

(b) adhesive stamps over-printed with the letters "U.P.";

Provided that the payment of stamp duty on instruments, executed in any part of British India other than Uttar Pradesh and governed by section 19-A of the said Act, as amended in its application to the Uttar Pradesh, may be indicated by such stamps as may be prescribed for use in that part to the extent of the duty payable there, the additional duty, if any chargeable in the Uttar Pradesh being paid by means of stamps prescribed in this rule. Sub-rule (2) of this rule shall take effect from 1st April, 1942:—

Provided further that all impressed and adhesive stamps for indicating the payment of duty with which instruments are chargeable and which are not over-printed with the words "Uttar Pradesh" or "U.P." respectively, shall be consumed or exchanged at the treasuries in Uttar Pradesh, provided that they are undamaged and unspoiled, with over-printed stamps of the name and denomination and description before 1st April, 1942, after which date the use or exchange of impressed and adhesive stamps not so over-printed, shall not be permissible, except to the extent indicated in the First Proviso."

The effect of section 76 already mentioned above is that this rule operates as a part of the Stamp Act. In deciding whether the instrument had been duly stamped or not the public officer had to consider not only the provisions of the Act but also the provisions of the Rules. The position that confronted the officers may be summarised thus : The document had been executed in Uttar Pradesh. So, it became liable to pay duty under section 3 (aa) of the Act as amended in Uttar Pradesh. Rule 3 required that the liability had to be discharged by using stamps over-printed with the words "Uttar Pradesh" or "U. P.". The instrument did in fact bear stamps over-printed with the words "West Bengal" and not with the words "Uttar Pradesh" or "U. P." The public officer was therefore bound to hold that it had not been stamped in accordance with the law in force in Uttar Pradesh.

On behalf of the petitioner it is urged that even so the officer should have held that the document was duly stamped. Reliance is placed for this contention on the definition of the words "duly stamped" in section (2) (ii) of the Act. The definition runs thus :—

"'duly stamped' as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in India."

Leaving out of consideration for the present, the question of what should be the proper amount of the stamp, it is necessary to consider whether when the officer found that the stamp had not been affixed or used "in accordance with the law for the time being in force in Uttar Pradesh" he was entitled to say also that the stamp had not been affixed or used in accordance with the law for the time being in force in "India". It is pointed out that like the Uttar Pradesh Legislature the Bengal Legislature had also amended the stamp law and framed its own Rules.

The amendment of section 3 in Bengal was by the addition of a Proviso in these words :—

" Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clause (a) (b) or (c) of this section or in Schedule 1, the amount indicated in Schedule 1-A to this Act shall, subject to the exemptions contained in that Schedule, be the duty chargeable under this Act on the following instruments, mentioned in clauses (aa) and (bb) of this Proviso as the proper duty therefor respectively.

(aa) every instrument, mentioned in Schedule 1-A as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed in Bengal on or after the first day of April, 1922 ; and

(bb) every instrument mentioned in Schedule 1-A, as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed out of Bengal on or after the first day of April, 1922, and relates to any property situated, or to any matter or thing done or to be done in Bengal and is received in Bengal."

The Bengal Government also framed Rules under section 76 which were duly published in the Gazette and on such publication became part of the Act. Rule 3 of these Rules, as it now stands requires that the duty payable must be paid by means of stamps over-printed with the words " West Bengal ". The instrument in the present case is mentioned in Schedule 1-A of the Stamp Act as in force in West Bengal and though executed out of West Bengal it relates to property situated in West Bengal and was for the purposes of registration received in West Bengal. It was therefore chargeable under section 3 (bb) of the Stamp Act as in force in Bengal. This duty was paid by stamps over-printed with the words " West Bengal " in accordance with the Stamp Rules in force in West Bengal. On behalf of the petitioner it is urged that the stamp law in force in West Bengal was as much a law in force in India as the stamp law in Uttar Pradesh is the law in force in India. It is argued that in deciding whether an instrument is " duly stamped " within the meaning of the Stamp Act it was necessary for the officer in Uttar Pradesh to ascertain the law in other parts of India also in order to decide whether or not " stamp " has been affixed or used in accordance with the law for the time being in force in India.

It is next urged that when the officer finds that an instrument has been stamped in accordance with the law in force in West Bengal he is bound to hold that it has been stamped in accordance with the law for the time being in force in India and thus " duly stamped " within the meaning of the Stamp Act.

The problem is therefore reduced to this : Where an officer in Uttar Pradesh finds that an instrument has not been stamped in accordance with the law in force in Uttar Pradesh, how is he to proceed ? It is easy to see that similar problems may arise before public officers of other States. Thus, an officer in Bihar who has to decide whether a particular instrument has been duly stamped, may find that it has been stamped in accordance with the law in force in Madras but not in accordance with the law in force in Bihar. Should he hold that the instrument has been duly stamped, in such circumstances ?

Primarily, the liability of an instrument to stamp duty arises on execution. Execution in India itself made the instrument liable to stamp duty under section 3 (a) as it stood before the amendment. Under section 3 (c) execution out of India, where the instrument relates to property situated or any matter or thing done or to be done in India together with the further fact that the instrument is received in India, made the instrument chargeable with duty. In amending the Stamp Act what the State Legislatures substantially did was to treat the particular State as equivalent to India. Thus, after the amendment by the U. P. Legislature the position in law is that execution of an instrument in Uttar Pradesh is made the primary dutiable event and liability to stamp duty arises on such execution. Apart from that, liability also arises where the instrument though executed out of Uttar Pradesh relates to property situated or any matter or thing done or to be done in Uttar Pradesh and is received in Uttar Pradesh. It may be mentioned that the changes in the law made by the other State Legislatures are exactly similar.

It is clear that in many cases the only one liability, *viz.*, the liability on execution of the document will arise. After the amendment of the Act the liability can no longer be said to arise generally in India but must be held to arise in the particular State where the instrument is executed. It stands to reason that liability having arisen in a particular State it cannot be held to be discharged in accordance with the law in force in India unless it is discharged in accordance with the law of the State where it arises. In other words, where the only liability of an instrument to stamp duty is the execution in Uttar Pradesh it must bear stamps of the amount and of the description as required by the law of Uttar Pradesh. If the liability of the instrument is on execution in Bihar it must bear stamps of the amount and description required by the law in Bihar; and so in the case of every other State which has amended the Stamp law in the same manner as in Uttar Pradesh. In all these cases the instrument can be said to be duly stamped only if it bears stamps of the amount and description in accordance with the law of the State concerned—the law including not only the Act but also the Rules framed under the Act.

Some complications arise in the cases where both the liabilities arise—*i.e.*, where the instrument is executed in one State but is related to property situated in or to things done or to be done in another State and is received in the second State. In these cases the liability to stamp duty arises first under the stamp law of the first State on account of the execution in the State; a second liability arises under the law of the second State when the instrument is received in that second State.

How is the liability to be discharged? Has it to be discharged in accordance with the law in force in the State where execution takes place or in accordance with the law in force in the State where the second dutiable event, *viz.*, the receipt in the second State occurred? Obviously, an officer, of the first State may reasonably think that it is the law of his State which must prevail and so even if the document has been stamped in accordance with the law of the other State he may ignore that stamping as not done in accordance with the law in India and proceed to demand that it must bear stamps in accordance with the law of his State. It was to avoid the hardships that may conceivably result from such a situation that the Legislatures of different States enacted section 19-A of the Stamp Act. This section of the Uttar Pradesh Act runs thus :—

“19-A. Where any instrument has become chargeable in any part of the States other than the Uttar Pradesh with duty under this Act or under any other law for the time being in force in any part of the States and thereafter becomes chargeable with a higher rate of duty in the Uttar Pradesh under clause (bb) of the First Proviso to section 3, then,

(i) notwithstanding anything contained in the First Proviso to section 3 the amount of duty chargeable on such instrument shall be the amount chargeable on it under Schedule I-A, or Schedule I-B, less the amount of duty, if any, already paid on it in the States; and

(ii) in addition to the stamps, if any, already affixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the amount of duty chargeable on it under (i) in the same manner and at the same time and by the same persons as though such instrument were an instrument received in the States for the first time at the time when it becomes chargeable with the higher duty.”

Therefore, where the rate of duty in Uttar Pradesh for an instrument which becomes chargeable for stamp duty as mentioned above, (*i.e.*, an instrument executed out of Uttar Pradesh and relating to property situated or to any matter or thing done or to be done in Uttar Pradesh) with a higher rate of duty in Uttar Pradesh than in West Bengal, only the excess has to be paid in Uttar Pradesh and it is only this excess which requires to be paid in Uttar Pradesh stamps. (*Vide* Rule 3 of the Uttar Pradesh Rules.)

Section 19-A in terms applies only to an instrument which after becoming chargeable in any State outside Uttar Pradesh becomes chargeable in Uttar Pradesh with a higher rate of duty. It seems to us, however, that where the rate of duty in Uttar Pradesh is the same or even lower, no further duty is payable on such an instrument. For, it would be anomalous and unreasonable to hold that the Legislature intended that though where a higher rate is payable in Uttar Pradesh the

excess need only be paid, the Uttar Pradesh rate should be paid in full where what has already been paid is the same or higher.

The result of this will be that if an instrument after becoming liable to duty in one State on execution there becomes liable to duty also in another State on receipt there, it must first be stamped in accordance with the law of the first State and it will not require to be further stamped in accordance with the law of the second State when the rate of that second State is the same or lower; and where the rate of the second State is higher, it will require to be stamped only with excess amount and that in accordance with the law and the Rules in force in the second State.

The mortgage deed which is the subject-matter of the present petition was executed in Uttar Pradesh, though it related to property situated in West Bengal and was received in that State for registration. The first dutiable event was the execution, which took place in U. P.; the second dutiable event was the receipt in West Bengal. When it came before the officers of Uttar Pradesh for decision whether it was duly stamped or not, the officers of Uttar Pradesh were bound to hold—for the reasons we have discussed earlier—that the instrument was not duly stamped as it did not bear Uttar Pradesh stamps. The fact that the instrument had been stamped in accordance with the law of West Bengal could not justify a conclusion that it had been stamped in accordance with the law in force in India. The Officers of the State of U. P. therefore rightly held that the original mortgage deed was not duly stamped.

The petitioners are not, therefore, entitled to any relief. In the circumstances of the case, we order that the parties will bear their own costs.

K.S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Chandra Deo Singh

.. Appellant*

v.

Prokash Chandra Bose *alias* Chabi Bose and another

... Respondents.

Criminal Procedure Code (V of 1898), section 202—Scope of enquiry—Person named as accused against whom process has not been issued—Locus standi to take part in the enquiry—Section 203—Scope.

Constitution of India (1950), Article 134 (1) (c)—High Court cannot limit its certificate to only some of the grounds.

The High Court in granting a certificate under Article 134 (1)(c) of the Constitution cannot limit it to some of the grounds only.

A person against whom a complaint is made and process has not been issued has no right to take part in an enquiry under section 202 of the Criminal Procedure Code. It would not be open to the Magistrate to put any questions to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that he cannot go. Whatever defence the accused may have can only be enquired into at the trial.

For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry.

Where there is a *prima facie* case, even though much can be said on both sides, a Committing Magistrate is bound to commit an accused for trial. All the greater reason therefore, that where there is *prima facie* evidence, even though an accused may have a defence like that in the present case that the offence is committed by some other person or persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused. (The offence with which the accused was charged in the instant case was one triable by a jury. The Magistrate cannot usurp the jurisdiction of the jury.)

The complainant is entitled to know why his complaint has been dismissed with a view to consider an approach to a Revisional Court. Being kept in ignorance of the reasons (as the order did not record any reasons for dismissing the complaint) clearly prejudices his right to move the Revisional Court.

Appeal from the Judgment and Order dated the 27th January, 1960 of the Calcutta High Court in Criminal Revision No. 620 of 1959.

Sukumar Ghose, Advocate, for Appellant.

Jai Gopal Sethi, Senior Advocate, (*G. L. Sareen* and *T. Kumar*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by certificate granted by the High Court of Calcutta under Article 134 (1) (c) of the Constitution of India. The facts which are relevant for the purpose of this appeal are briefly these :

On 25th December, 1957, one Panchanan Roy lodged a First Information Report at 11. 00 P. M. at the Police Station, Bhangor, in the district of 24 Parganas alleging that respondent No. 1 (Prokash Chandra Bose) who is the proprietor of a fishery had killed a man named Nageswar Singh who was a *darwan* posted at the informant's masters' fishery by shooting him with a gun. After the occurrence, the assailant's party was chased, but the principal culprit namely, respondent No. 1, made good his escape in his own car. Two of his associates, Pannalal Saha and Sankar Ghose, were arrested by the local people and produced in the Police Station. On the basis of the First Information Report, the Police undertook investigation, but ultimately they submitted a final report as late as on 17th September, 1958.

On 3rd November, 1958, one Mahendra Singh who claimed to be a distant relative of the deceased *darwan*, but which fact is denied by the widow of the deceased—filed a complaint before Mr. C. L. Choudhry, the Sub-Divisional Magistrate of 24 Parganas, Alipore, against the final report of the Police and asked for processes to be issued against certain other persons on the allegation that those persons had murdered Nageswar Singh. The complaint further contained a statement to the effect that the First Information Report lodged by Panchanan Roy with the Police on 25th December, 1957 was false and that he had done so at the instance of his master Bidhu Bhusan Sarkar who was an enemy of respondent No. 1. After examining Mahendra Singh on oath and looking into the Police papers, the learned Sub-Divisional Magistrate asked Mr. N. M. Choudhry, Magistrate, First Class, to hold a judicial enquiry into the allegations made by Mahendra Singh and to submit a report to him by a certain date.

During the pendency of the enquiry into the complaint of Mahendra Singh Chandra Deo Singh, the nephew of the deceased filed a complaint before Mr. Choudhry on 30th December, 1958, stating therein that respondent No. 1 had fired a shot at Nageswar Singh at point blank range and thereby murdered him. After examining him on oath, the Sub-Divisional Magistrate referred the matter again to Mr. N. M. Choudhry, Magistrate, First Class, for enquiry and report to him by a certain date. During this enquiry, respondent No. 1 was permitted by the learned Magistrate to appear through counsel. Seven witnesses were produced by the complainant Chandra Deo Singh and examined by the learned Magistrate. In addition, Pannalal Saha and Sankar Ghose who, it might be remembered, are alleged to have been the associates of respondent No. 1, were examined as Court witnesses and the suggestion is that the learned Magistrate did this at the instance of the counsel for respondent No. 1.

On 9th February, 1959, Mr. N. M. Choudhry made a report to the Sub-Divisional Magistrate to the effect that a *prima facie* case has been made out against three persons, Upendra Neogi, Asim Mondal and Arun Mondal under section 302/34 of the Indian Penal Code. On the same day, he made another report to the Sub-Divisional Magistrate saying that no *prima facie* case was made out against respondent No. 1. On the basis of the first report, the Sub-Divisional Magistrate directed summonses to be issued against the three persons named in that report and commenced committal proceedings against them. The Sub-Divisional Magistrate on seeing the second report dismissed the complaint of Chandra Deo Singh without assigning any reason. Chandra Deo Singh preferred an application for

revision before the Sessions Judge, Alipore, who, after issuing notice to respondent No. 1 and hearing his counsel, directed the Sub-Divisional Magistrate to make further enquiry against him. Thereupon respondent No. 1 preferred a revision application before the High Court, which came up for hearing before a single Judge of that Court. It would appear that the three persons against whom summonses were ordered to issue by the Sub-Divisional Magistrate also preferred a revision application before the High Court. Both the revision applications were heard together. The learned Judge granted the application of respondent No. 1 as well as that of Upendra Neogy. We are informed by learned Counsel for respondent No. 1 that eventually two of the three persons against whom summonses were ordered to be issued by the Sub-Divisional Magistrate were committed for trial before the Court of Sessions. But he was unable to say definitely whether they were actually tried and if so, what the result of the trial was.

Aggrieved by the order of the learned Single Judge, the appellant Chandra Deo Singh made an application under Article 134 of the Constitution for the grant of a certificate of fitness for appeal to this Court which, as already stated, was granted by the High Court. The certificate was sought by the appellant on four grounds. The first ground was that respondent No. 1 had no *locus standi* to appear and contest a criminal case before the issue of process. The second ground was that the test propounded by the learned single Judge for determining the question whether any process should be issued by the Court was erroneous. The third ground was that a Magistrate making an enquiry under section 202 of the Code of Criminal Procedure had no jurisdiction "to weigh the evidence in golden scales" as was done in the present case. The fourth and last ground was that the learned Sub-Divisional Magistrate acted in contravention of the provisions of section 203, Criminal Procedure Code, in dismissing the complaint without recording any reason for doing so. The High Court granted the certificate on all the grounds except the first. It has been held by this Court that the High Court cannot limit its certificate in this manner and, therefore, we propose to examine all the four grounds taken by the appellant.

Taking the first ground, it seems to us clear from the entire scheme of Chapter XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No. 1 that the very object of the provisions of Chapter XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions can, according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects behind the provisions of section 202, Criminal Procedure Code, is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view

to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under section 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the Legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in the case before us that the two persons who were examined as Court witnesses were so examined at the instance of respondent No. 1 but from the fact that they were persons who were alleged to have been the associates of respondent No. 1 in the First Information Report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for respondent No. 1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection the observations of this Court in *Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar and another*¹, may usefully be quoted :

"The enquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage, for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial."

Coming to the second ground, we have no hesitation in holding that the test propounded by the learned single Judge of the High Court is wholly wrong. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is "sufficient ground for proceeding" and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. A number of decisions were cited at the Bar in which the question of the scope of the enquiry under section 202 has been considered. Amongst those decisions are : *Parmanand Bramachari v. Emperor*², *Radha Kishun Sao v. S.K. Misra & another*³, *Ramkisto Sahu v. The State of Bihar*⁴, *Emperor v. J.A. Finan*⁵, and *Baidya Nath Singh v. Muspratt and others*⁶. In all these cases, it has been held that the object of the provisions of section 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The Courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-section (1) of section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.

This brings us to the third ground. Section 203 of the Code of Criminal Procedure which empowers a Magistrate to dismiss a complaint reads thus :

1. (1961) 2 S.C.J. 39: (1961) 2 M.L.J. (S.C.) 16: (1961) 2 An.W.R. (S.C.) 16: (1961) M.L.J. (Cr.) 389: (1961) 1 S.C.R. 1, at p. 9.
2. A.I.R. 1930 Pat. 30.

3. A.I.R. 1949 Pat. 36.
4. A.I.R. 1952 Pat. 125.
5. A.I.R. 1931 Bom. 524.
6. (1887) I.L.R. 14 Cal. 141.

"The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and the result of the investigation or inquiry, if any, under section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

The power to dismiss a complaint rests only with a Magistrate who has taken cognisance of it. If before issue of process, he had sent down the complaint to a Magistrate subordinate to him for making the enquiry, he has the power to dismiss the complaint, if in his judgment, there is no sufficient ground for proceeding. One of the conditions, however, requisite for doing so is the consideration of the statements on oath if any made by the complainant and the witnesses and of the result of the investigation of the enquiry which he had ordered to be made under section 202, Criminal Procedure Code. In the case before us an investigation by a police officer was not ordered by the learned Sub-Divisional Magistrate, but an enquiry by a Magistrate, First Class. He had, therefore, to consider the result of this enquiry. It was not open to him to consider in this connection the statements recorded during investigation by the Police on the basis of the First Information Report lodged by Panchanan Roy or on the basis of any evidence adduced before him during the enquiry arising out of the complaint made by Mahendra Singh. All these were matters extraneous to the proceedings before him. Of course, as we have already stated, the learned Magistrate has not given any reasons for dismissing the complaint and, therefore, we do not know what exactly weighed with him when he dismissed the complaint, but the learned single Judge of the High Court who has dealt with the case elaborately has not kept the evidence adduced in the two complaints separate but appears to have been influenced in deciding one case on the basis of what was stated by the witnesses in the other case. The High Court has relied upon the evidence of Pannalal Saha and Sankar Ghose who ought never to have been examined by enquiring Magistrate. The High Court has further relied upon the investigation made by the Police in the complaint of Panchanan Roy. All this will be clear from the following passage in its judgment :

"The version of these two witnesses (Pannalal Saha and Sankar Ghose) is supported by the fact that the Police when they went to the locality found a dead bird and a pair of shoes and a pair of black half-pants in wet condition. This find of the dead bird and the pair of shoes etc. was not explained on the version given by Panchanan Roy, Upendra Mondal and Tarapada Naru. Mr. Ajit Kumar Dutt stated that the inquiring Magistrate was not right in examining Pannalal Saha and Sankar Ghose at the suggestion of an Advocate for the accused Chhabbi Bose and that the latter should not have been allowed at the inquiry. When however there had already been a full investigation into the case by the officers under the supervision of the Superintendent of Police, it was desirable and proper for the inquiring Magistrate to make a careful inquiry and not merely an one-sided inquiry by examining such witnesses as might be produced by an interested party. Moreover, in this case, the learned Magistrate was inquiring into both the complaints simultaneously and necessarily he could look at the evidence as a whole. In fact two separate cases ought not to have been started at all, even though there were two separate complaints giving two different versions. These complaints were more or less Naraji petitions against the final report submitted by the Police. There was only one incident in the course of which Nageswar Singh has lost his life. Therefore on the basis of the two Naraji petitions it would have been proper to hold one inquiry rather than two separate though simultaneous inquiries."

What the Magistrate could not do, the High Court was incompetent to do, and therefore, its order reversing that of the Sessions Judge cannot be sustained.

Reliance is, however, placed by Mr. Sethi on the decision of this Court in *Fazil's case*¹, at page 10 of the report. What was considered there by this Court was whether as a matter of law, it was not open to a Magistrate to accept the plea of the right of private defence at a stage when all that he had to determine was whether process is to issue or not. The learned Judges held that it is competent to a Magistrate to consider such a plea and observed :

"If the Magistrate has not misdirected himself as to the scope of an enquiry under section 202 and has applied his mind judicially to the materials before him, we think that it would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. What bearing such a plea has on the case of the complainant and his witnesses, to what extent they are falsified by the evidence of other witnesses, all these are questions which must be answered with reference to the facts of each case. No universal rule can be laid in respect of such questions."

1. (1961) 2 S.C.J. 39 : (1961) 2 M.L.J. (S.C.) L.J. (Cri) 339 : (1961) 1 S.C.R. 1.
16 : (1961) 2 An.W.R. (S.C.) 16 : (1961) M.

On the basis of these observations it was urged that this Court has held that a Magistrate has the power to weigh the evidence adduced at the enquiry. As we read the decision, it does not lay down an inflexible rule but seems to hold that while considering the evidence tendered at the enquiry it is open to the Magistrate to consider whether the accused could have acted in self-defence. Fortunately, no such question arises for consideration in this case but we may point out that since the object of an enquiry under section 202 is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting under sections 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry under section 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this. By "evidence of other witnesses" the learned Judges had apparently in mind the statements of persons examined by the Police during investigation under section 202. It is permissible under section 203 of the Code to consider such evidence along with the statements of the complainant recorded by the Magistrate and decide whether to issue process or dismiss the complaint. The investigation in that case was made by the Police under section 202, Criminal Procedure Code at the instance of the Presidency Magistrate. Apparently, the statements of the various witnesses questioned by the Police were self-contradictory. That being the case, it was open to the Presidency Magistrate to consider which of them to accept and which to reject. The enquiring Magistrate has not stated nor has the High Court found in the case before us that the evidence adduced on behalf of the complainant and his own evidence were self-contradictory and, therefore, it could not be said that there was anything intrinsically false in the allegations made in the complaint. Learned counsel for the appellant referred us to the decision of this Court in *Ramgopal Ganpatrai Ruia & another v. The State of Bombay*¹. In that case, after quoting a passage from Halsbury's Laws of England, Vol. 10, 3rd Edition in Article 666 at page 365 where the law regarding commitment for trial has been stated, this Court has observed :

"In each case, therefore, the Magistrate holding the preliminary inquiry has to be satisfied that a *prima facie* case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit, and unless he is so satisfied, he is not to commit. Applying the aforesaid test to the present case, can it be said that there is no evidence to make out a *prima facie* case or that the voluminous evidence adduced in this case is so incredible that no reasonable body of persons could rely upon it? As already indicated, in this case, there is a large volume of documentary evidence—the latter being wholly books and registers and other documents kept or used by the Mills themselves, which may lend themselves to the inference that the accused are guilty or to the contrary conclusion. The High Court has taken pains to point out that this is one of those cases where much can be said on both sides. It will be for the jury to decide which of the two conflicting versions will find acceptance at their hands. This was pre-eminently a case which should have been committed to the Court of Session for trial, and it is a little surprising that the learned Presidency Magistrate allowed himself to be convinced to the contrary."

Thus, where there is a *prima facie* case, even though much can be said on both sides, a Committing Magistrate is bound to commit an accused for trial. All the greater reason, therefore, that where there is *prima facie* evidence, even though an accused may have a defence like that in the present case that the offence is committed by some other person or persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused. Incidentally, we may point out that the offence with which respondent No. 1 has been charged with is one triable by jury. The High Court, by dealing with the evidence in the way in which it has done, has in effect sanctioned the usurpation by the Magistrate of the functions of a jury which the Magistrate was wholly incompetent to do.

In view of what we have stated above, it is not necessary to say very much about the last ground. Section 203 of the Code of Criminal Procedure provides that where the Magistrate dismisses a complaint because in his judgment there

1. (1958) S.C.J. 266 : (1958) M.L.J. (Cal.) 217 : (1958) S.C.R. 618 at 638.

is no sufficient ground for proceeding with trial, he shall record his reasons for doing so. Here, as already stated, the Magistrate perused the report of the enquiring Magistrate and then proceeded to dismiss the complaint. It is stated on behalf of respondent No. 1 that this is at best an error in his order and therefore, it is curable under section 537 (a) of the Code of Criminal Procedure. In support of this view, reliance is placed upon the decision of this Court in *Willie (William) Slaney v. The State of Madhya Pradesh*¹. Here, the error is of a kind which goes to the root of the matter. It is possible to say that giving of reasons is a pre-requisite for making an order of dismissal of a complaint and absence of the reasons would make the order a nullity. Even assuming, however, that the rule laid down in *Slaney's case*¹, applies to such a case prejudice is writ large on the face of the 'order'. The complainant is entitled to know why his complaint has been dismissed with a view to consider an approach to a revisional Court. Being kept in ignorance of the reasons clearly prejudices his right to move the revisional Court and where he takes a matter to the revisional Court renders his task before that Court difficult, particularly in view of the limited scope of the provisions of sections 438 and 439, Code of Criminal Procedure. For all these reasons, we hold that the High Court was in error in setting aside the order of the Sessions Court and direct that further enquiry be made into the complaint of the appellant against respondent No. 1.

Mr. Sethi, however, contends that since there is only one offence, i.e., the murder of Nageswar Singh, there can be only one trial and since other persons are being tried for that offence, there could be no further enquiry. As there was no material on record we could not know what happened to the enquiry against Asim Mondal and Arun Mondal after the dismissal of their application for revision by the High Court. We therefore, called for a report from the Sub-Divisional Magistrate, 24 Paraganas. That report has been received. It would appear from that report, that on 22nd March, 1961, the High Court directed that the commitment proceedings against these two persons be stayed pending the disposal of the present appeal by this Court. We cannot appreciate the argument that an enquiry against a different person with reference to the same offence cannot be undertaken. It will be open to the Court before which commitment proceedings against Asim Mondal and Arun Mondal are pending to consider whether they should be stayed pending the result of the enquiry with reference to the respondent before us, but there can be no legal impediment to the enquiry against the respondent.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, ¹*Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, M. HIDAYATULLAH AND J.C. SHAH, JJ.

The State of Rajasthan and another

.. *Appellants**

v.

Sripal Jain

.. *Respondent.*

Rajasthan Civil Services (Classification, Control and Appeal) Rules (1953), Rule 244 (2)—Compulsory retirement under—Rule 31 (vii) (a) of the Business Rules framed under Article 166 of the Constitution of India (1950)—If applicable.

Rule 31 (vii) (a) of the Business Rules framed under Article 166 of the Constitution when it speaks of "compulsory retiring of any officer" refers only to compulsory retirement as a penalty under rule 14 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules (1953, and not to the two other kinds of retirement, namely, superannuation under rule 55 or retirement under rule 244 (2), of the Service Rules. Accordingly a case of compulsory retirement under rule 244 (2) of the Service Rules need not be submitted to the Governor under rule 31 (vii) (a) of the Business Rules.

Appeal by Special Leave from the Judgment and Order dated the 23rd February, 1961 of the Rajasthan High Court in D.B. Civil Writ No. 416 of 1959.

1. (1956) S.C.J. 162 : (1956) 1 M.L.J. (S.C.) 100 : (1955) 2 S.C.R. 1149.

* C.A. No. 269 of 1962.

24th January, 1963.

G.C. Kasliwal, Advocate-General for the State of Rajasthan (*S.K. Kapur* and *P.D. Menon*, Advocates, with him, for Appellants).

Veda Vyasa, Senior Advocate, (*K.K. Jain*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Rajasthan High Court. The respondent was in the service of the State of Rajasthan and at the material time was a Circle Inspector. He was compulsorily retired from service on 3rd September, 1960 under rule 244 (2) of the Rajasthan Service Rules, (hereinafter referred to as the Service Rules). The order for his retirement was communicated to him by the Inspector-General of Police, Rajasthan, on 11th April, 1960. The respondent however made representations to the Government and the order was kept in abeyance and was finally put into effect from 3rd September, 1960, after the Government had rejected the representation. The Government ordered on 2nd September, 1960 that the order of 11th April, 1960 regarding compulsory retirement should be put into immediate effect. The respondent thereupon filed a writ petition in the High Court and contended *inter alia* that the Inspector-General of Police had no authority to order his compulsory retirement under rule 244 (2) of the Service Rules. He also contended that the order amounted to punishment within the meaning of rule 14 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 (herein after referred to as the Classification Rules), and therefore as it was passed without giving him an opportunity to show cause as required under Article 311 of the Constitution, it was bad.

The petition was opposed on behalf of the State of Rajasthan and it was contended that an order of compulsory retirement under rule 244 (2) of the Service Rules was not a punishment within the meaning of the Classification Rules, and therefore Article 311 had no application to it. It was also urged that the order had been passed by the Government and not by the Inspector-General of Police, who had merely acted in issuing the order under the direction of the Government. The case of the appellants was that under rule 244 (2) of the Service Rules, the Government had an unqualified discretion to retire any officer compulsorily if it was in the public interest so to do, and provisions of Article 311 of the Constitution would not apply to such an order of compulsory retirement. The appellant's case further was that a high-powered Committee had been set up under the chairmanship of the Chairman of the Public Service Commission to consider the cases of all such officers whose retention in public service after twenty-five years of service was not in the public interest and that Committee recommended the compulsory retirement of the respondent. That recommendation was put up before the Home Minister of the Government of Rajasthan, who accepted the finding and recommendations of the Committee. The matter was then put up before the Chief Minister who agreed with the Home Minister and thereafter the Inspector-General of Police was directed to order the retirement of the respondent.

When the matter came to be heard in the High Court it was submitted on behalf of the respondent that under rule 31 (vii) (a) of the Rules of Business (hereinafter referred to as the Business Rules), all cases of compulsory retirement where the appointing authority is the Government have to be submitted to the Governor and the Chief Minister. As in the present case the matter was admittedly not submitted to the Governor, the order of compulsory retirement even if it was made by the Government was not legal as it was against the Business Rules. The reply of the appellants to this contention was that rule 31 (vii) (a) of the Business Rules only applied to that kind of compulsory retirement which was inflicted as a punishment under rule 14 of the Classification Rules and not to other cases of compulsory retirement. The High Court however accepted the contention of the respondent that rule 31 (vii) (a) of the Business Rules applied to a case of compulsory retirement under rule 244 (2) of the Service Rules, and as the papers had not been submitted to the Governor the order of compulsory retirement in the present case was bad. It therefore allowed the writ petition and set aside the order.

The main question that falls for consideration therefore is whether a case of compulsory retirement under rule 244 (2) of the Service Rules has to be submitted to the Governor under rule 31 (vii) (a) of the Business Rules. There are three kinds of compulsory retirement provided in the various rules relating to services in Rajasthan. Firstly, compulsory retirement on proportionate pension is provided as a penalty under rule 14 of the Classification Rules and this can be ordered whatever may be the length of service of a civil servant. Secondly, compulsory retirement is provided by rule 56 of the Service Rules as a matter of course on a civil servant reaching the age of superannuation, namely 55 years. And thirdly, compulsory retirement may be ordered under rule 244 (2) of the Service Rules which provides that the Government retains an absolute right to retire any Government Servant after he has completed 25 years of qualifying service without giving any reason and no claim to special compensation on this account will be entertained. This right however will not be exercised except when it is in public interest to dispense with the further service of a Government Servant.

The contention on behalf of the respondent in the High Court was that all kinds of compulsory retirement have to be referred to the Governor under rule 31 (vii) (a) of the Business Rules and reliance in this connection was placed on the language of the rule. It is therefore necessary to set out rule 31 (vii) in full.

“ 31. The following classes of cases shall be submitted to the Governor and the Chief Minister before the issue of orders :—

(i)	..	..	..
(ii)	..	..	..
(iii)	..	..	..
(iv)	..	..	..
(v)	..	..	..
(vi)	..	..	..

(vii) (a) Proposals for dismissing, removing or

compulsory retiring of any officer where the appointing authority is the Government.

(b) Where a review petition is proposed to be rejected and it is against an order issued after submission to the Governor under item (vii) (a) of Rule 31.

(c) In a case where, on review, the Governor decides to enhance the penalty already imposed and the enhanced penalty is one of dismissal, removal or compulsory retirement of an officer whose appointing authority or appellate authority is Government.”

There is no doubt that the words “ proposals for compulsory retiring of any officer where the appointing authority is the Government ” appearing in item (vii) (a) are general and are not qualified by the words “ as penalty ” and may be open to the interpretation that all the three kinds of compulsory retirement mentioned above must be referred to the Governor. But reading these words in item (vii) (a) in the collocation in which they appear it seems to us that when that item talks of “ compulsory retiring of any officer ” it is referring to compulsory retirement as a penalty. The words “ compulsory retiring of any officer ” follow the words “ dismissing ” and “ removing ”. Now dismissing and removing are penalties provided by rule 14 of the Classification Rules and it seems to us therefore that in the collocation in which the words “ compulsory retiring ” appear in item (vii) (a) they must be read as a penalty like dismissing and removing. Besides reference to clauses (b) and (c) of item (vii) to which the High Court did not refer at all would reinforce this conclusion. Clause (b) says that “ where a review petition is proposed to be rejected and it is against an order issued after submission to the Governor under item (vii) (a) of Rule 31 ”, the matter must be referred to the Governor. Clause (b) therefore refers to a review petition relating to orders passed under item (vii) (a) for dismissal, removal or compulsory retirement. Now there can hardly be any reason for a review petition in the case of compulsory retirement on reaching the age of superannuation, i.e., 55 years under rule 56 of the Service Rules. We further find that review petitions are provided under the Classification Rules in Part VII and rule 34 of the Classification Rules in particular provides for Governor’s powers to review. It is obvious that when clause (b) speaks of a review petition, it must be

referring to the review under Part VII of the Classification Rules. Clause (b) therefore which is confined to cases under clause (a) which speaks of dismissal, removal or compulsory retirement, shows that all these are penalties as provided in rule 14 of the Classification Rules. Further clause (c) provides that "where, on review, the Governor decides to enhance the penalty already imposed and the enhanced penalty is one of dismissal, removal or compulsory retirement of an officer" the matter must be referred to the Governor. The clause makes it perfectly clear that the compulsory retirement referred to therein is a case of penalty and there can in our opinion be no doubt when we read this clause with clause (a) that compulsory retirement mentioned therein must also be of the nature of a penalty. Taking all the three clauses of item (vii) as a whole, it appears that item (vii) provides for a complete scheme with reference to three kinds of penalties, namely, dismissal, removal and compulsory retirement and makes it incumbent that cases of this kind must be referred to the Governor. We cannot therefore agree with the High Court that compulsory retirement provided in item (vii) (a) includes all the three kinds of compulsory retirement. It must therefore be held that the contention of the appellants that compulsory retirement provided in item (vii) (a) is compulsory retirement as a penalty and not compulsory retirement of the other two kinds, namely, (1) compulsory retirement on attaining the age of superannuation and (2) compulsory retirement under rule 244 (2), neither of which is a punishment, is correct. In particular Note 2 of rule 244 (2) makes it perfectly clear that action thereunder is not a penalty. This is further made clear by *Explanation* (vi) to rule 14 of the Classification Rules, which provides that "compulsory retirement of a Government servant in accordance with the provisions relating to his superannuation or retirement" is not a penalty. Rule 56 of the Service Rules is a rule relating to superannuation and rule 244 (2) of the Service Rules is a rule relating to the retirement and both of them do not amount to penalties in view of this *Explanation*. We are therefore of opinion that rule 31 (vii) (a) when it speaks of compulsory retiring of an officer speaks of compulsory retirement as a penalty and not compulsory retirement on reaching the age of superannuation or under rule 244 (2). It is therefore not necessary to submit the papers with respect to compulsory retirement of the respondent under rule 244 (2) to the Governor. This was the only ground on which the High Court allowed the writ petition and therefore the appeal must succeed.

It is however urged on behalf of the respondent that rule 244 (2) of the Service Rules contemplates an order of compulsory retirement by Government and the order in the present case was not passed by the Government but by the Inspector-General of Police. It is further urged that if it is an order of the Government it should be in the form required by Article 166 of the Constitution, and as it is not in that form there is in law no order of the Government ordering the compulsory retirement of the respondent. The order is in these terms :—

"The following Inspectors of Police are compulsorily retired from the Government service under Rule 244 (2) of P.S.R. :—

.....

(2) Shri Sripal Jain, s/o Shri Sohanlal, C.I. Sanganer, Distt. Jaipur.

....."

There is no doubt that this order is not in the form required under Article 166 of the Constitution. But it is well settled that any defect of form in the order would not necessarily make it illegal and the only consequence of the order not being in proper form as required by Article 166 is that the burden is thrown on the Government to show that the order was in fact passed by it. It has been stated on behalf of the appellants that the order in question was communicated by the Inspector-General of Police on the direction of the Government. It will be noticed that the order is in the passive voice. It does not say in the active voice that the Inspector-General of Police ordered the retirement of the officers mentioned therein, though the impression that a person will get from it certainly is that the order of retirement was being passed by the Inspector-General of Police. Therefore, the burden was thrown because of this defect in the form of the order on the appellants to show

that in fact the order was passed by the Government. That has in our opinion been shown by the production of papers from the relevant file by the appellants. That shows that the recommendation of the high-powered Committee was approved by the Home Minister and the Chief Minister and the order of compulsory retirement was thus passed by the Government of Rajasthan. In this connection we may refer to rule 21 of the Business Rules. It says that cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge except as otherwise provided by any other rule. The only exception is rule 31 (vii) (a) and that we have held does not apply to a case of compulsory retirement under rule 244 (2). In these circumstances the order was of Government, though it was communicated by the Inspector-General of Police and its form was defective. In the circumstances the order of retirement having been passed by a proper authority cannot be said to be invalid in law.

It is further urged that under the Rajasthan General Clauses Act, VIII of 1955, "Government" or "the Government" includes both the Central Government and any State Government under section 32 (33) and "the State Government" means under section 32 (75) as from 1st November, 1956, the Governor, and therefore when rule 244 (2) requires an order by the Government, there should be an order of the Governor. Definitions under section 32 are however to be read subject to anything repugnant in the subject or context or any contrary intention, and that takes us back to the Business Rules framed under Article 166 of the Constitution, where the power to deal with a case of this kind is given to the Minister-in-charge under rule 21. The definitions therefore of "Government" and "the State Government" in the Rajasthan General Clauses Act are of no help to the respondent once it is held that rule 31 (vii) (a) of the Business Rules when it speaks of "compulsory retiring of any officer" refers only to compulsory retirement as a penalty under rule 14 of the Classification Rules and not to the two other kinds of retirement (namely, superannuation under rule 56 or retirement under rule 244 (2) of the Service Rules).

The appeal is therefore allowed and the order of the High Court set aside. In the circumstances we pass no order as to costs.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO, K.C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.

N. Masthan Sahib and another

— *Appellants**

v.

The Chief Commissioner, Pondicherry and another

— *Respondents, etc.*

Constitution of India (1950), Article 1 (3) (c)—Territories of the Union—Territories as may be acquired—Specific enquiry by the Court of the Government—Reply by the Government that Pondicherry is not within the territory of India—Answer, if binding on the Court—Principles.

The answer of the Government in reply to a specific and formal enquiry by the Court that it did not consider a particular area to have been "acquired" by the Indian Government and therefore not a part of the territory of India was binding on the Court.

The proposition laid down in the English decisions that a conflict is not to be envisaged between the Executive Government and the Judiciary appears to rest on sound reasoning.

It is not considered necessary to examine the position in a contingency *i.e.*, where the Government of the day for its own desiring to exclude the jurisdiction of the Court denied that a part of territory which patently was within Article 1 (3) of the Constitution was within it.

By the agreement dated October 21, 1954, though complete administrative control has been transferred to the Government of India, this transfer of control cannot be equated to a transfer of territory, that being the common intention of the parties to that agreement. Unless a ratification takes place there would be legally no transfer of territory and without a transfer of territory there

would not be in the circumstances an "acquisition of territory", with the consequence that at present Pondicherry has to be treated as not part of the territory of India.

The term 'territory of India' used in several Articles in the Constitution means the territory of India for the time being as falls within Article 1 (3).

By appropriate action under the Foreign Jurisdiction Act, or by Parliamentary legislation under the Entry "Foreign Jurisdiction" the appellate jurisdiction of the High Court or of the Supreme Court should be enlarged under Articles 225 and 138 (1) respectively so as to afford an adequate remedy for the inhabitants of these areas in order to avoid injustice and a sense of grievance.

Per Sarkar and Das Gupta, JJ.—If a party has been given by the Constitution a fundamental right to a writ, there is no power in the Court to refuse that right. Supposed practical considerations of incapacity to enforce the writ issued cannot be allowed to defeat the provisions of the Constitution. The Supreme Court would be fully justified in proceeding on the basis that any order made by it would be carried out by any officer of the Government of India to whom it is directed wherever he may be, out of respect for the Constitution and the Court and this without requiring to be forced to do so. It is the duty of the Court under section 57 of the Evidence Act to take judicial notice of the extent of the territory of the State by requesting the Government to enlighten the Court on that matter.

Appeals by Special Leave from the Judgments and Orders dated the 7th September, 1960, of the Chief Commissioner, Pondicherry in Appeals Nos. 56 and 57 of 1960, and Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

N. G. Chatterjee and A. V. Viswanatha Sastri, Senior Advocate, (*R. K. Garg, M. K. Ramamurthy, S. C. Agarwal and D. P. Singh*, Advocates of *M/s. Ramamurthy & Co.*, with him), for Appellants Petitioners (In both the Appeals and the Petitions).

C. K. Daphtary, Solicitor-General of India and *B. Sen*, Senior Advocate (*B.R.L. Iyengar and T. M. Sen*, Advocates, with them), for Respondent No. 1 (in both the Appeals) and Respondents Nos. 1 and 2 (In both the Petitions).

A. S. R. Chari, Senior Advocate (*K. R. Chaudhuri and R. Mahalingier*, Advocates, with him), for Respondent No. 2 (In both the Appeals).

R. Gopalakrishnan, Advocate, for Respondent No. 3 (In both the Petitions.)

The Court delivered the following judgments :

Rajagopala Ayyangar, J. (on behalf of Gajendragadkar J., Wanchoo J. and himself) :—In compliance with our directions the two questions were forwarded to the Union Government and they submitted their answers to them in the following terms :

"Question No. (1).—Whether Pondicherry which was a former French Settlement is or is not at present comprised within the territory of India as specified in Article 1 (3) of the Constitution by virtue of the Articles of the Merger Agreement dated October 21, 1954, between the Governments of India and France and other relevant agreements, arrangements, acts and conduct of the two Governments.

Answer.—The French Settlement (Establishment) of Pondicherry is at present not comprised within the territory of India as specified in clause (3) of Article 1 of the Constitution by virtue of the Agreement dated the 21st October, 1954, made between the Government of France and the Government of India or by any other agreement or arrangement. By the aforesaid Agreement, dated the 21st October, 1954, the Government of France transferred, and the Government of India took over, administration of the territory of all the French Establishments in India, including Pondicherry, with effect from the 1st November, 1954. A copy of the Agreement is enclosed. This is expressed to be a *de facto* transfer and was intended to be followed up by a *de jure* transfer. A Treaty of Cession providing for *de jure* transfer has been signed by the Government of France and the Government of India on the 28th May, 1956, but has not been so far ratified in accordance with the French Law as well as in accordance with the Article 31 of the Treaty. A copy of the Treaty is also enclosed. The Government of India has been administering Pondicherry under the Foreign Jurisdiction Act, 1947, on the basis that it is outside India and does not form part of the territory of India.

Question No. (2).—If the answer to Question 1 is that Pondicherry is not within the territory or India, what is the extent of the jurisdiction exercised by the Union Government over the said territory and whether it extends to making all and every arrangement for its civil administration, its defence and in regard to its foreign affairs. The Government of India might also state the extent of jurisdiction which France possesses over the area and which operates as a diminution of the jurisdiction ceded to or enjoyed by the Government of India.

Answer.—The Government of India has been exercising full jurisdiction over Pondicherry in executive, legislative and judicial matters in accordance with Foreign Jurisdiction Act, 1947. In doing so it has followed the aforesaid Agreement. The Government of France has not also exercised any executive, legislative or judicial authority since the said Agreement.

The jurisdiction of the Government of India over Pondicherry extends to making all arrangements for its civil administration. The administration of the territory is being carried on under the Foreign Jurisdiction Act, 1947, and in accordance with the French Establishments (Administration) Order, 1954, and other Orders made under sections 3 and 4 of that Act. The Government of India have been aiming at conducting the administration of Pondicherry so as to conform to the pattern of administration obtaining in India consistent with the said Agreement. Accordingly a large number of Acts in force in India have already been extended to Pondicherry.

The Government of India hold the view that the sole responsibility in regard to arrangement for the defence of Pondicherry devolves on themselves.

Pondicherry has no foreign relations of its own. No claims have been made by the Government of France in this matter nor have the Government of India recognized the existence of any such claim.

The Government of France do not possess any *de facto* jurisdiction over Pondicherry which would imply any diminution of the jurisdiction exercised by the Government of India."

The appeals and the writ petitions were thereafter posted for further hearing before us on 9th October, 1961.

Mr. N. C. Chatterji—learned Counsel for Shri Masthan Sahib, appellant in Civil Appeal No. 42 of 1961 and petitioner in Writ Petition No. 297 of 1960, urged before us two contentions. The first was that the answer to the second question clearly established that the French establishments including Pondicherry were part of the territory of India having been acquired by the Union Government within the meaning of Article 1 (3) (c) and that in view of this position it was not necessary to consider nor proper for us to accept the views expressed by the Union Government in their answer to the first question wherein they had expressly stated that they did not consider the French "establishments" covered by the agreement between the Union Government and the Government of France dated 21st, October, 1954, as being within the territory of India within Article 1 (3) of the Constitution of India. Secondly, a point which was necessarily involved in the first one just set out—that this Court was not bound by the statement of the Government of India in its answer to Question No. 1 and that it should disregard such an answer and investigate for itself on the materials placed before it as to whether Pondicherry was part of the territory of India or not.

In support of the first submission Mr. Chatterji placed considerable reliance on the passage in our judgment rendered on 28th April, 1961, reading :

"Still if the extent of the jurisdiction vested in the Union Government by the arrangements entered into between the two Governments virtually amounts to a transfer of sovereignty for every practical purpose, it would be possible to contend that such a transfer or cession was so incompatible with the existence of any practical sovereignty in the French Government as to detract from the surrender or transfer being other than complete."

The argument was that the answer to the second question showed (1) positively that the Government of India exercised complete jurisdiction over the territory, executive, legislative and judicial, its authority being plenary and extending to the making of laws, their execution and the administration of justice with complete power over its defence and foreign affairs, and (2) negatively, that the Government of France possessed no authority in the territory, so much so that it could not be predicated that there had been any retention of even a vestigial sovereignty to detract from the completeness of the transfer. In the circumstances, learned Counsel urged that he was justified in inviting us to ignore or disregard the answer to the first question and instead answer the question as to whether these French establishments were within the territory of India or not on the basis of the answer to the second question.

Having regard to the nature of this argument it is necessary to state briefly the circumstances in which we felt it necessary to frame the two questions that we did. At the stage of the hearing of the petitions on the first occasion, notice was issued to the Union Government and the learned Solicitor-General appearing in response to the notice did not convey to us any definite views on the part of the Government as to whether Pondicherry was or was not considered by them to be part of the territory of India but invited the Court to decide the question on the materials

that might be placed by the parties before us. At that stage therefore we were not quite certain whether Government would be prepared to make a formal statement about their views on this question. If therefore the Government were inclined still to leave the matter to the Court, we desired to have complete information as to the factual position regarding the Government of the territory. It was in view of that possibility that Question No. 2 was framed. It was, of course, possible that Government might communicate their views to the Court and with a view to enable this to be done we framed Question No. 1. In these circumstances nothing is gained by reference to the passage in our judgment dated 28th April, 1961. The passage extracted is certainly not an authority for the position as to whether if Question No. 1 was answered, the Court could properly consider any implications or inferences arising on the answer to Question No. 2.

We shall therefore proceed to consider the principal question that arises at this stage, *viz.*, whether the answer of the Government in reply to a specific and formal enquiry by the Court that it did not consider a particular area to have been "acquired" by the Indian Government and therefore not a part of the territory of India was binding on the Court or not. A number of decisions of the English and Australian Courts in which the point has been considered were placed before us and we shall proceed to refer to the more important of them.

In *Diff Development Company v. Government of Kelantan*¹, the question related as to whether the Sultan of Kelantan was the ruler of an independent sovereign State, such that the Courts in England had no jurisdiction over the Sultan or the Government of that State. The Secretary of State for the Colonies who was requested by the Court to furnish information as regards the status of the ruler and of the Government, stated that the Sultan was the head of an independent sovereign State. The binding character of this statement was however questioned and it was argued before the House of Lords on foot of certain public documents that Kelantan was merely a dependency of the British Government and not a sovereign State. On the other side, it was pressed upon the House, that the statement of the Secretary of State was binding and this latter submission was unanimously accepted by the House. In doing so Viscount Cave observed :

"If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise ; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point."

Viscount Finlay expressed himself thus :

"It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence ; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance."

Lord Sumner said :

"Where such a statement is forthcoming no other evidence is admissible or needed."

There is one other decision of the House of Lords to which reference may usefully be made—*Government of the Republic of Spain v. Arantzazu Mendi*². The question for decision was whether it was General Franco's Government that was the Government in Spain or the Republican Government. The Secretary of State for Foreign Affairs had, in a formal communication to the Court in reply to a letter forwarded under the direction of Bucknill, J., stated that His Majesty's Government had recognised the Nationalist Government as the Government which had administrative control over a large portion of Spain and particularly over the Basque Provinces wherein the ship, title to which was in question, had been registered. Lord Wright in his speech said :

"The Court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's Government for this purpose in a matter of this nature."

1. L.R. (1924) A.C. 797.

2. L.R. (1939) A.C. 256.

"Such a statement is a statement of fact, the contents of which are not open to be discussed by the Court on grounds of law."

No doubt, these decisions were in relation to the status of or recognition by the Government of foreign sovereign and are therefore not *ad idem* with the point which now arises for consideration, *viz.*, whether a particular piece of territory is or is not part of the territory of India. A statement by Government in relation to a similar question came up before the Court of Appeal in *Fagernes*¹. The question for the Court's consideration was whether the Bristol Channel, particularly at the point where a collision was stated to have taken place, was or was not part of British territory. Hill, J. before whom an action for damage caused by the alleged collision came up held that the waters of the Bristol Channel were part of British territory and therefore within the jurisdiction of the High Court. The defendants appealed to the Court of Appeal and at that stage the Attorney-General appeared and in response to a formal enquiry by the Court as to whether the place where the collision was stated to have occurred was within the realm of England, replied that "the spot where the collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends." On the basis of this statement the Court of Appeal unanimously reversed the judgment of Hill, J. An argument was raised before the Court as regards the binding character of the statement by the Attorney-General and in regard to this Atkin, L.J. said :

"I consider that statement binds the Court, and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed. I think that it is desirable to make it clear that this is not a decision on a point of law, and that no responsibility rests upon this Court save that of treating the statement of the Crown by its proper officer as conclusive."

Lawrence, L.J., observed :

"It is the duty of the Court to take judicial cognizance of the extent of the King's territory and, if the Court itself is unacquainted with the fact whether a particular place is or is not within the King's territory, the Court is entitled to inform itself of that fact by making such inquiry as it considers proper. As it is highly expedient, if not essential, that in a matter of this kind the Courts of the King should act in unison with the Government of the King, this Court invited the Attorney-General to attend at the hearing of the appeal, and at the conclusion of the arguments asked him whether the Crown claimed that the spot where the collision occurred was within the territory of the King. The Attorney-General, in answer to this inquiry, stated that he had communicated with the Secretary of State for Home Affairs, who had instructed him to inform the Court that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends." In view of this answer, given with the authority of the Home Secretary upon a matter which is peculiarly within the cognizance of the Home Office, this Court could not, in my opinion, properly do otherwise than hold that the alleged tort was not committed within the jurisdiction of the High Court."

Banks, L.J., though he agreed with his colleagues in allowing the appeal, however struck a slightly different note saying :

"This information was given at the instance of the Court, and for the information of the Court. Given under such circumstances, and on such a subject, it does not in my opinion necessarily bind the Court in the sense that it is under an obligation to accept it."

The entire matter is thus summarised in Halsbury's Laws of England, Third Edition, Volume 7 :—

"There is a class of facts which are conveniently termed 'facts of state.' It consists of matters and questions the determination of which is solely in the hands of the Crown or the Government, of which the following are examples :

(1)

(2) Whether a particular territory is hostile or foreign, or within the boundaries of a particular state."

Mr. Chatterji, however, invited our attention to certain observations contained in two decisions of the High Court of Australia—*Jolley v. Mainka*², and *Frost v. Stevenson*³. In both these cases the point involved was as to the status of the territory of New Guinea which Australia was administering as mandatory territory

1. L.R. (1927) Probate 311.

2. 49 C.L.R. 242.

3. 58 C.L.R. 528.

under a mandate from the League of Nations. There are, no doubt, observations in these cases dealing with the meaning of the word 'acquired' in section 122 of the Commonwealth of Australia Act, but the point to be noticed however is that there was no statement by the Government of the Commonwealth of Australia as to whether this area was or was not part of the territory of Australia, such as we have in the present case. We do not, therefore, consider that these observations afford us any assistance for the solution of the question before us.

Both Mr. Chatterji and Mr. Viswanatha Sastri, learned counsel who appeared for Sivarama Reddiar, the appellant and petitioner in the other cases, stressed the fact that what we were called upon to decide was the meaning of the expression 'acquired' in Article 1 (3) (c) of the Constitution and that in the case of a written Constitution such as we had to construe, the jurisdiction of this Court was not to be cut down and the enquiry by it limited by reasons of principles accepted in other jurisdictions. In particular, learned counsel stressed the fact that it would not be proper for the Court to ignore patent facts and hold itself bound by the statement of Government in cases where, for instance, the Government of the day for reasons of its own desiring to exclude the jurisdiction of this Court denied that a part of territory which patently was within Article 1 (3) was within it. It is not necessary for us to examine what the position would be in the contingency visualized, but assuredly it is not suggested that the case before us falls within that category. The proposition laid down in the English decisions that a conflict is not to be envisaged between the Executive Government and the Judiciary appears to us to rest on sound reasoning and except possibly in the extreme cases referred to by the learned counsel, the statement of the Government must be held binding on the Court and to be given effect to by it.

There is one other matter which was specially pressed upon us during the course of argument to which it is necessary to refer. The submission was that the answer by the Union Government to the two questions were really contradictory and that whereas the answer to the second question made it out that the French establishments had been acquired and were part of the territory of India, the Government had in relation to the first question made a contradictory answer. We do not consider this argument well-founded. In cases where the only fact available is the *de facto* exercise of complete sovereignty by one State in a particular area, the sovereignty of that State over that area and the area being regarded as part of the territory of that State would *prima facie* follow. But this would apply normally only to cases where sovereignty and control was exercised by unilateral action. Where however the exercise of power and authority and the right to administer is referable to an agreement between two States, the question whether the territory has become integrated with and become part of the territory of the State exercising *de facto* control depends wholly on the terms upon which the new Government was invited or permitted to exercise such control and authority. If the instruments evidencing such agreements negatived the implication arising from the factual exercise of Governmental authority then it would not follow that there is an integration of the territory with that of the administering power and that is precisely what has happened in the present case. As annexures to their reply the Union Government have included the Treaty of Cession dated 28th May, 1956, which is a sequel to the agreement dated 21st October, 1954, transferring the powers of the Government of the French Republic to the Government of the Indian Union. Under its terms, this Treaty would become operative and full sovereignty as regards the territory of the establishments of Pondicherry, Karaikal, Mahe and Yanam would be ceded to the Indian Government only when the Treaty comes into force. It is not necessary to refer to all the clauses of this Treaty except the one which stipulates that it would come into force on the day of ratification by the two Governments concerned. According to the Constitution of France an Act of the French Assembly is required for the validity of a Treaty relating to or involving the cession of French territory. It is common ground that the Treaty has not been ratified yet. The resulting position therefore is that by the agreement dated 21st October,

1954, though complete administrative control has been transferred to the Government of India, this transfer of control cannot be equated to a transfer of territory, that being the common intention of the parties to that agreement. Unless a ratification takes place there would legally be no transfer of territory and without a transfer of territory there would not be in the circumstances an "acquisition of territory", with the consequence that at present Pondicherry has to be treated as not part of the territory of India. It is unnecessary to consider what the position would have been if the Union Government had, notwithstanding the terms of the Treaty, treated the former French establishments as having become part of the territory of India.

There was one minor submission made by Mr. Viswanatha Sastri to which a passing reference may be made. He suggested that the term "territory of India" in Article 142 might not represent the same concept as "the territory of India" within Article 1(3) and that in the context of Article 142 the term "territory of India" might include every territory over which the Government of the Union exercised 'de facto' control. We are not impressed by this argument. The term "territory of India" has been used in several Articles of the Constitution and we are clearly of the opinion that in every Article where this phraseology is employed it means the territory of India for the time being as falls within Article 1(3) and that the phrase cannot mean different territories in different Articles.

We have already dealt with the question as to what the effect on the maintainability of the appeals and the petitions would be if Pondicherry were not part of the territory of India. In view of Pondicherry not being within the territory of India we hold that this Court has no jurisdiction to entertain the appeals. The appeals therefore fail and are dismissed. The Writ Petitions must also fail and be dismissed for the reason that having regard to the nature of the relief sought and the authority against whose orders relief is claimed they too must fail. They are also dismissed. We would add that these dismissals would not preclude the petitioners from approaching this Court, if so desired, in the event of Pondicherry becoming part of the territory of India. In the peculiar circumstances of this case we direct that the parties bear their respective costs.

Before leaving this case, we desire to point out that the situation created by the French establishments not being part of the territory of India is somewhat anomalous. Their administration is being conducted by the extension of enactments in force in India by virtue of the power conferred by the Foreign Jurisdiction Act. We have had occasion to point out that though technically the areas are not part of Indian territory, they are governed practically as part of India. But so far as the orders of the Courts and other authorities—judicial and quasi-judicial within that area are concerned, the Superior Courts in India have not, subject to what we have stated as regards the limited jurisdiction of this Court, any appellate or revisional jurisdiction over them and this might in a large number of cases lead to injustice and a sense of grievance. There is enough power in Government even at the stage of the *de facto* transfer to remedy the situation. By appropriate action under the Foreign Jurisdiction Act, or by Parliamentary legislation under the entry 'Foreign Jurisdiction' the appellate jurisdiction of the High Court or of this Court could be enlarged under Articles 225 and 138 (1) respectively so as to afford an adequate remedy for the inhabitants of these areas. To this aspect of the matter we consider that the attention of Government should be drawn.

Sarkar, J. (for himself and *Das Gupta, J.*).—On the earlier occasion when these cases came up before this Court, we postponed further hearing of them till we received the answers of the Government of India to two questions which we then referred to it. These questions substantially were, (a) whether Pondicherry is or is not within the territories of India and (b) if it is not, the extent of the jurisdiction exercised by the Union Government over it and the jurisdiction which France still possesses in regard to it. These questions were put because considerable doubt was felt as to the real status of Pondicherry. If it was a foreign territory, no appeal

could lie to this Court under Article 136 of the Constitution from any tribunal in Pondicherry and two of these matters were such appeals. The other two matters were petitions asking for writs against certain authorities in Pondicherry and the majority held that no writ could issue to a foreign territory in view of Article 142 of the Constitution and therefore for the purposes of these petitions also it was necessary to ascertain the status of Pondicherry. We however then felt some difficulty about the question whether we could refuse to issue writs to an officer of the Government of India outside the territory of India and expressed our inability to concur in the opinion of the majority. We said that the proper time to discuss that question would be when on receipt of the Government's answers to our questions, it had to be held that Pondicherry was a foreign territory and reserved our final decision on the question till then.

The Government's answers to our questions have now been received. On the basis of these answers, for the reasons hereafter mentioned, it has to be held that Pondicherry is a foreign territory. We, therefore, now wish to say a few words on the question on which we reserved our opinion on the former occasion. The opinion of the majority no doubt prevails in spite of what we shall say. Before we discuss the question which we reserved, we desire to observe in regard to the appeals that it must be held that they are not maintainable as Pondicherry is a foreign territory.

Now, the writs are sought to quash the orders of a quasi-judicial authority functioning in Pondicherry on the ground that they violate certain fundamental rights of the petitioners. This authority however is an officer of the Government of India. How far writs can be issued under Article 32 of the Constitution of India to quash a quasi-judicial order even if made in India, is itself a question of considerable difficulty on which there has been a difference of opinion in this Court. That question was recently discussed before another Bench but the judgment in that case has not yet been delivered. For the present purpose however we will assume that writs can be issued under Article 32 to quash a quasi-judicial order.

The first observation that we wish to make is that it has now been finally held by this Court, dealing with an application under Article 32, that "the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right": *Kavalappara Kottarathill Kochunni v. The State of Madras*¹. A right to move this Court by a petition under Article 32 is, therefore, a fundamental right. That being so, a right to obtain a writ when the petition establishes a case for it, must equally be a fundamental right. For, it would be idle to give a fundamental right to move this Court and not a similar right to the writ the issue of which the petition might clearly justify. If then a fundamental right to a writ is established,—and that is the assumption on which we are examining the present question—the party who establishes such right must be entitled *ex debito justitiæ* to the issue of the necessary writ. There would then be no power in the Court to refuse in its discretion to issue it.

But it is said that if a writ was issued in the present case, it could not in view of Article 142 which says that an order of this Court shall be enforced throughout the territory of India, be enforced in Pondicherry. Let us assume that that is so. Then it is said that if the Court were to issue the writ it would only be stultifying itself and should not therefore issue it. We are unable to accede to this contention. If a party has been given by the Constitution a fundamental right to a writ, there is no power in the Court to refuse that right. Supposed practical considerations of incapacity to enforce the writ issued cannot be allowed to defeat the provisions of the Constitution.

No authority has been cited to us in support of the proposition that when a party is entitled as of right to an order, a Court can refuse to make that order on the ground that it would thereby be stultifying itself. So far as we have been able to ascertain, orders are refused on this ground when the matter is one for the dis-

¹. (1959) S.C.J. 858 : (1959) 2 A.W.R. (S.C.) S.C.R. 316, 325.
70 : (1959) 2 M.L.J. (S.C.) 70 : (1959) Supp. 2

cretion of the Court. Such cases have, for instance, frequently occurred in proceedings relating to the issue of injunctions, to grant or not to grant which is, as is well known, in the discretion of the Court. The discretion has no doubt to be judicially exercised as indeed all discretions have, but nonetheless the right to the relief is in the discretion of the Court as opposed to a relief to which a party is entitled *ex debito justitiae*, a distinction which is well understood. Thus, dealing with a case of the issue of an injunction restraining a person from proceeding with an action in a foreign Court, Jessel, M.R., observed in *In re International Pulp and Paper Co., Ltd.*¹, "Therefore, as to a purely foreign country, it is of no use asking for an order, because, the order cannot be enforced". Take another case. In England an information in the nature of *quo warranto* is not issued as a matter of course (*R. v. Stacey*²) and therefore the Courts there refuse to issue it when an information would be futile in its results: Halsbury's Laws of England (3rd. ed.), Vol. 11, page 148. So in *Reg v. Fox*³, the Court refused to issue the information for the reason that the person sought to be removed by it could be reappointed at once. These however are cases in which a Court would be inclined not to make a discretionary order on the ground that the Court would thereby be stultifying itself. Instances might be multiplied but it is unnecessary to do so. We do not think that the principle of these cases can be applied where a Court has no option but to make the order which we think is the present case. It would clearly be less applicable to a case like the present where, as we shall immediately show, it would be wrong to think that the order would not be carried out.

Lastly, can we be certain that the Court would be stultifying itself by issuing the writ in this case? That would be only if our order is sure to be ignored. We think that this Court would be fully justified in proceeding on the basis that any order made by it would be carried out by any officer of the Government of India to whom it is directed wherever he may be, out of respect for the Constitution and this Court and this without requiring to be forced to do so. In this connection the case of *R. v. Speyer, R. v. Cassel*,⁴ is of interest. There Speyer and Cassel had been called upon by the Court by rules *nisi* to show cause why an information in the nature of *quo warranto* should not be exhibited against them to show by what authority they respectively claimed to be members of His Majesty's Privy Council for Great Britain. Speyer and Cassel were naturalised British subjects and the question was whether under certain statutes they were not disqualified from being appointed to the Privy Council. One of the arguments on behalf of the respondents was that the Court would be powerless to enforce a judgment of ouster for it could not prevent the immediate reinstatement of the names of these persons in the roll of Privy Councillors if the King thought fit to alter it. The answer that Reading, C.J., gave to this argument was,

"Although it may be interesting and useful for the purpose of testing the propositions now under consideration to assume the difficulties suggested by the Attorney-General, none of them would in truth occur. This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the crown."

The other members of the Bench also took the same view, Lush, J., observing, "The consequences he suggests are argumentative and not real, and we cannot regard them as fettering the exercise of our jurisdiction". Now this was a case of a discretionary order. Even so, the Court felt that it would be wrong to stay its hand only on the ground that it could not directly enforce its order. This salutary principle has been acted upon in our country by Das, J., who later became the Chief Justice of this Court, in *In re Banwarilal Roy*⁵. There Das J. issued an information in the nature of *quo warranto* in spite of the fact that he could not command the Governor of Bengal to comply with his order which might therefore have become futile. We think it is a very healthy principle and should be followed. We do not think that

1. L.R. (1876) 3 Ch. D. 594, 599.

2. (1785) 1 T.R. 1.

3. 8 E.& B. 939.

4. L.R. (1916) 1 K.B. 595.

5. 48 G.W.N. 766.

we can allow our powers for the protection of fundamental rights to be fettered by considerations of the enforcement of orders made by us ; we must assume that the authorities in Pondicherry will willingly carry out our order.

We turn now to the other questions arising on the Government's answers. Pondicherry was admittedly a French possession but under an agreement with France, the Government of India is now administering it. The Government has definitely stated that Pondicherry is not comprised within the territory of India. It has also said that it has full jurisdiction over Pondicherry under that agreement, that the liability for defence of Pondicherry is on it and that Pondicherry has no foreign relations. It has further said that France does not possess any *de facto* jurisdiction over Pondicherry which would imply a diminution of the jurisdiction exercised by it.

It was contended that we are not bound by the Government's answer to the first question, namely, that Pondicherry is outside India and that on the basis of the answer to the second question we should hold, in spite of the Government's view that Pondicherry is a part of Indian territory. It was said that since India had admittedly full jurisdiction over Pondicherry and France exercised none, it must be held that India has acquired sovereignty over it and that it had, therefore, become Indian territory by acquisition. We are entirely unable to accept this contention. We think that we are bound by the Government's decision at least in a case where we have referred to it for our guidance. That is the view taken in England and it is a view which is based on sound principle : see *Duff Development Co. v. The Government of Kelantan*¹. Any other view would create a chaos and we cannot be a party to it. We may say that by a treaty, as in the present case, India may acquire full jurisdiction over a foreign territory which under the same treaty may nonetheless remain a foreign territory.

It was contended that this would be absolute surrender to the executive Government ; that such a view would enable the Government when it so liked, to disown a territory which was patently a part of India so that it might act therein as it liked in complete disregard of the laws and without any check from any Court including this Court. This contention, to use the words of Lush, J., in *Speyer's case*², is "argumentative and not real". We cannot imagine that in a democracy any Government would ever act in the way suggested and we are sure no Government of this country will ever do so.

Furthermore, the contention has no foundation whatever and is wholly imaginary. It is the duty of a Court to take judicial notice of the extent of the territory of its own State. Section 57 of the Evidence Act requires that. Therefore, if the fact is patent that a certain territory is within India, the Courts will take judicial notice of it and there will be no occasion to refer to the Government for any information regarding it. It may however be that in certain circumstances the fact is not patent but even then it appears that it will be the duty of a Court to take judicial notice and it does so by requesting the Government to enlighten it on the point. So Lawrence, L.J., said in *Fagernes*³,

"It is the duty of the Court to take judicial cognisance of the extent of the King's territory and, if the Court itself is unacquainted with the fact whether a particular place is or is not within the King's territory, the Court is entitled to inform itself of that fact by making such enquiry as it considers necessary."

It is only in cases where the Court is not aware of the facts that the question of referring to the Government will arise and therefore no occasion can possibly arise where the Government might have the chance of distorting a patent fact.

This is all that we desire to say. As the majority of the learned Judges of the Bench have taken a different view, the order to be made will follow their decision.

1. L.R. (1924), A.C. 797.
2. L.R. (1916) 1 K.B. 495.

3. L.R. (1927) Prob. 311, 329.

ORDER OF THE COURT:—In accordance with the opinion of the majority, the appeals and petitions are dismissed. The parties will bear their respective costs.

V.S.

Appeals and petitions dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K.N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Sikandar Jehan Begum and another

*.. Appellants/Petitioners.**

v.

Andhra Pradesh State Government and others

.. Respondents.

Hyderabad Atiyat Enquiries Act (X of 1952), section 13 (2)—Constitutionality—If offends against Article 14 of the Constitution of India (1950) since it is the right of citizen to have questions of succession tried by a Civil Court.

The fact that the Nizam usually accepted the decision of the enquiry does not alter the legal position that the Nizam might well have refused to accept the opinion and might even have refused to make a grant of the estate to any one among the several claimants. Therefore, even under the circulars issued by the Nizam for holding enquiries into the questions of succession to Jagirs, the position appears to be clear that Jagirs were not heritable and on the death of the Jagirdar, on principle and in theory, it was always a case of resumption and regrant. Therefore, any person who claimed to be the successor of the deceased Jagirdar had no right to come to a civil Court for establishing that claim. Thus, the argument that section 13 (2) of the Hyderabad Atiyat Enquiries Act (X of 1952) offends against Article 14 of the Constitution of India (1950) cannot be sustained. Further, the non-Atiyat estate will not be covered by the order passed by the Chief Minister and the title in respect of it will have to be tried by in the Civil Courts.

Ammeerunnissa Begum and others v. Mahboob Begum and others, (1953) S.C.J. 61: (1953) S.C.R. 404, distinguished.

Appeal by Special Leave from the Judgment and Order dated the 30th June, 1952, of the former Hyderabad High Court in Writ Application No. 13 of 1950, and Petition under Article 32 of the Constitution.

M. C. Setalvad, Attorney-General, for India (*J. B. Dadachanji*, Advocate and *S. N. Andley*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder & Co.* with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*T. V. R. Tatachari* and *T. M. Sen*, Advocates, with him), for Respondents Nos. 1 to 4 (In the Appeal) and 1 to 5 (in the petition.)

Danial A. Latifi and *Sardar Bahadur*, Advocates, for Respondents Nos. 8 to 13 (In the Appeal) and 6 to 11 (in the petition.)

The Judgment of the Court was delivered by

Gajendragadkar, J.—Writ Petition No. 197 of 1956 and Civil Appeal by Special Leave No. 279 of 1960 arise between the same parties and they raise a short question about the validity of section 13, sub-section (2) of the Hyderabad Atiyat Enquiries Act, 1952 (X of 1952) (hereinafter called the Act). The decision of this question lies within a narrow compass but the facts leading up to the Civil Appeal and the Writ Petition are somewhat complicated and they must be stated at the outset in order that the background of the dispute may be properly appreciated.

Sikander Jehan Begum and Khurshid Jehan Teleyawar Begum are the petitioners in the Writ Petition and the appellants in the Civil Appeal. They are the legitimate sisters of Nawab Kamal Yar Jung who died on 26th January, 1944. According to the petition, the said Nawab left behind him three legitimate wives and two legitimate sisters but no legitimate children. He had, however, a number of Khawases (concubines) and three illegitimate sons and an illegitimate daughter. These are respondents Nos. 6-9 in the Writ Petition. The said illegitimate children

*C.A. No. 279 of 1960.
(Writ Petition No. 197 of 1956.)

were the issues of respondent Nos. 10 and 11 who were the concubines of the Nawab. Respondent Nos. 6-11, however, claimed to be the legitimate heirs of the said Nawab because according to them, respondent Nos. 10 and 11 were the legitimate wives of the Nawab. A dispute as to succession to the estate of the said Nawab has given rise to the present controversy.

The said Nawab belonged to a leading family of Nobles in the Hyderabad State and was possessed of large Jagir and non-Jagir properties. Soon after his death, the Nizam appointed a Commission of Enquiry to hold a regular enquiry into the Virasat of the late Nawab Kamal Yar Jung on 8th February, 1944. By the Firman issued by the Nizam in that behalf a direction was given that the Government should take the estate of the late Nawab under its supervision so that after the declaration of the successor, arrangements may be made about its delivery to the proper person. It appears that the Government accordingly took possession of the properties of the Nawab and continued in possession thereafter.

On 17th September, 1949, Police action commenced and it ended on the 26th September on which date the Military Governor took charge of the administration of the Hyderabad State. On 9th November, 1948, the Commission of Enquiry which had been appointed by the Nizam made its report. The report showed that according to the Commission, Husain Khan, Tahawar Husain Khan, Sadiq Husain, and Khatija Begum were the legitimate and lawful sons and daughter of the late Nawab, with the result that except for Riyasatunnisa Begum, Lal Bee and Azizunnisa Begum who were the wives of the late Nawab, none else could be held entitled to succeed to his estate. It appears that the report thus submitted by the Enquiry Commission did not receive the sanction or approval of the Nizam.

Subsequently, on 22nd November, 1948, the Nizam issued a Firman whereby a new Special Tribunal was constituted according to the opinion of the Military Governor and it was asked to hear the Virasat enquiry of the late Nawab. The Tribunal was given authority to record fresh evidence, if necessary. This Tribunal made its report on 3rd April, 1949. The majority of this Tribunal took the view that the three widows of the late Nawab were his legitimate wives and ought to get together As. 0-2-0 share. They also expressed the opinion that Sheerin Bua and Parichehra Bua were the Mutha wives and their sons Syed Mohd. Hussain Khan, Syed Tahawar Hussain Khan and Syed Sadiq Hussain Khan were the legitimate sons of the late Nawab and so they should all together get As. 0-12-0 share. The remaining As. 0-2-0 share should go to Khedja Begum who, in the opinion of the majority, was the legitimate daughter of the late Nawab.

It appears that after the Military Governor was put in charge of the administration of the State of Hyderabad, the Nizam issued a Firman on 19th September, 1948, delegating to the Military Governor all the authority for the administration of the State. Subsequently, by another Firman he made it clear that the authority delegated to the Military Governor included and shall always be deemed to have included authority to make Regulations. This latter Firman was issued on 7th August, 1949. In due course, the Chief Minister took the place of the Military Governor and the Nizam issued a Firman on 1st December, 1949, whereby all the powers of administration delegated by him to the Military Governor were as from the date of the notification terminated and the said powers were delegated to the Chief Minister. That is how the Chief Minister was vested with all the powers of administration which the Nizam possessed.

When the Military Governor was in charge of the administration of Hyderabad State, he exercised his delegated powers of legislation and promulgated several Regulations. One of these was the Hyderabad (Abolition of Jagirs) Regulation, 1358-F. This Regulation came into force on 15th August, 1949. Broadly stated, the effect of this Regulation was that all Jagir lands were incorporated into State lands as from the appointed day and their administration stood transferred to the Jagir Administrator who was to be appointed by the Government. The Regulation made necessary provisions for making cash payments out of the net income of the

Jagirs to the Jagirdar or Hissedars or maintenance holders. This arrangement was intended to serve as an interim arrangement pending the final disposal of the question about the commutation to be paid for the Jagirs. This Regulation was followed a few months later by the Hyderabad Jagirs (Commutation) Regulation, 1959-F. which came into force on 25th January, 1950. By this Regulation, provision was made for the payment of compensation by way of the commuted value of the Jagir which had to be determined by the Jagir Administrator in accordance with the relevant provisions of the Regulation.

On 26th January, 1950, the Constitution came into force and on 3rd April, 1950, the report submitted by the second Commission was confirmed by the Chief Minister. As a result of this confirmation, the shares of three sons and daughter as well as the three widows of the late Nawab were declared. Each son was recognised to be entitled to As. 4-0 share, the daughter to As. 2-0 share and the three widows between them to As. 2-0 share. It was also declared that Sheereen Bua, Parichehra Bua as the Mamta wives of the late Nawab were entitled to Guzara (maintenance) only. In substance, it is the order thus passed by the Chief Minister which has given rise to the present litigation between the parties.

The widows of the late Nawab—Ahmedunnisa Begum and Azizunnisa Begum—challenged the validity of the Government decision recorded in the confirmatory order passed by the Chief Minister by a Writ Petition before the High Court of Judicature at Hyderabad on 20th June, 1950. It was urged by them that the impugned decision of the Government was *ultra vires* and null and void and they claimed a writ of *Certiorari* quashing the said decision. As a consequential relief, they claimed appropriate orders against the parties who were held entitled to shares in the property of the late Nawab. The Writ Petition was first heard by a Division Bench of the Hyderabad High Court. The Bench found that the petition raised several questions of constitutional importance and so on 24th August, 1950, it referred the petition for disposal before a Full Bench. Accordingly, a Full Bench consisting of three learned Judges of the High Court heard it on 20th March, 1951. They held that the questions raised were of such a vital importance that it would be appropriate that a larger Full Bench should deal with them. That is how the questions formulated were referred to a larger Full Bench of five learned Judges of the High Court. After these questions were answered by the larger Full Bench, the matter was remitted to a Full Bench of three learned Judges and in accordance with the answers given, the Writ Petition was finally dismissed on 30th June, 1952. Meanwhile, on 14th March, 1952, the Act had come into force.

The two widows of the late Nawab then applied for and obtained a certificate from the High Court to prefer an appeal to this Court. On 27th December, 1955, however, the said widows purported to compromise their dispute with the opponents and expressed a desire not to prosecute the appeal before the Supreme Court any further. When the petitioners Sikander Jehan Begum and Khurshid Jehan Begum came to know about these developments, they immediately sent an application to this Court praying that their names should be transposed as appellants in the appeal pending before this Court, at the instance of the said two widows; in this application, they undertook to deposit the necessary security for costs as well as the printing charges. This application was, however, returned to the petitioners on the ground that it did not lie to this Court as the record had not been formally transmitted to it. Thereupon, the petitioners made a similar application before the High Court and the widows applied for permission to withdraw their appeal. Both the applications came on for hearing before the High Court on 16th August, 1955. The High Court, rejected the petitioners' application for transposition and allowed the widows' application granting them leave to withdraw their appeal. On 8th August, 1955, the petitioners had made an independent application to the High Court for leave to appeal to the Supreme Court against its judgment in the Writ Petition. This application was dismissed by the High Court on 20th March, 1956. Petitioners then applied for Special Leave and Special Leave was granted to

them. That is how Civil Appeal No. 279 of 1960 has come to this Court by Special Leave. Long before this appeal came here, the petitioners had filed a writ petition No. 197 of 1956. That in brief is the background of the dispute between the parties before us. It is common ground that our decision in the Writ Petition will govern the decision in the Civil Appeal. Indeed, as we have already indicated, both the proceedings raise the same point of law.

Before dealing with the said question, however, it is necessary to examine briefly the broad features of the Act. The Act was passed to amend and consolidate the law regarding Atiyat grants in respect of Atiyat enquiries, enquiries as to claims to succession to, or any right, title or interest in Atiyat grants and matters ancillary thereto. As section 15 of the Act shows, it repealed all previous circulars relating to this matter except as provided by clauses (a) and (b) of the said section. Sections 3 to 7 contain general provisions as to Atiyat grants. Under section 3, all Atiyat grants held immediately before the commencement of the Act shall continue to be held by the holders thereof and by their successors, subject to the conditions therein specified. Section 4 deals with the inquiries as to Atiyat grants in Jagirs. Section 5 prescribes the consequences of the breach of conditions of Muntakhab or Vasiqa. By section 6 alienations of the Atiyat grants are prohibited and exemption from attachment by a Court is granted in respect of them. This latter provision is, however, subject to the proviso that half the income of the Atiyat grant shall be attachable in execution of a decree through the Revenue Department. Section 7 provides that succession to Atiyat grants shall in future be regulated by the personal law applicable to the last holder. Sections 8 to 11 deal with the constitution of Atiyat Courts, their jurisdiction and procedure. Section 8 provides for hierarchy of four categories of Courts on whom powers could be conferred by Government by means of a notification issued under section 9. Section 10 provides that the jurisdiction and procedure of the Atiyat Courts shall be regulated in the manner specified in the Schedule and it adds that the time within which and the manner in which appeals may be filed against the decisions of the said Courts shall be such as may be prescribed. Section 11 deals with appeals. As a result of the provisions of section 11, the decision of the Board of Revenue shall be final. Then we have a group of five sections dealing with miscellaneous matters. Section 14 confers on the Government the power to make Rules, section 15 is the repealing section, and section 16 provides that the Act will cease to be applicable to any Inam to which at any time the Hyderabad Enfranchised Inams Act, 1952 is made applicable. That leaves sections 12 and 13 which require careful consideration.

Section 12 provides that the final decision of a Civil Court on questions of succession, legitimacy, divorce or other questions of personal law shall be given effect to by the Atiyat Court on the said decision being brought to its notice by the party concerned or otherwise irrespective of whether the decision of the Atiyat Court was given before or after the decision of the Civil Court. It is thus clear that though the Act has established a hierarchy of Atiyat Courts for dealing with the question about the succession to Atiyat estates, section 12 provides that the final decision of the Civil Court on matters therein specified binds the parties and has to be given effect to by the Atiyat Courts. Under this section, the final decision of the Civil Court will have to be given effect to even if it was pronounced after an Atiyat Court had decided the matter. That means the earlier decision of the Atiyat Court, if it is inconsistent with the subsequent decision of the Civil Court, will have to yield to the latter and the question of succession shall be governed in the light of Civil Court's decision.

That takes us to section 13. This section reads as follows :—

“13. (1) Except as provided in this Act, the decision of an Atiyat Court shall be final and shall not be questioned in any Court of Law.

(2) The orders passed in cases relating to Atiyat Grants including Jagirs on or after the 18th September, 1948 and before the commencement of this Act by the Military Governor, the Chief Civil Administrator or the Chief Minister of Hyderabad or by the Revenue Minister by virtue of powers given or purporting to be given to him by the Chief Minister shall be deemed to be the final orders validly passed by a competent authority under the law in force at the time when the order was passed and shall not be questioned in any Court of law.”

It will be noticed that the result of section 13 (2) is to validate the orders of the authorities therein specified which have been passed between 18th September, 1948, and 14th March, 1952. The first date refers to the commencement of the Police action and the latter to the commencement of the operation of the Act. The object of the Legislature clearly is to validate orders passed between the said two dates so that the questions determined by the relevant orders should not be reopened for enquiry either before the Atiyat Courts or before the Civil Courts. It is not disputed that between the commencement of the Police action and the passing of the Act events of historical importance took place in the State of Hyderabad and so treating that period as of unusual significance is not open to any criticism. Therefore, if the Legislature chose to deal with the orders passed during this period as constituting a class by themselves, that itself cannot be said to contravene Article 14 of the Constitution.

It is, however, urged that the result of the impugned provision is to deny the petitioners their right to have questions of succession adjudicated upon by a Civil Court and that itself constitutes discrimination which contravenes Article 14. In support of this argument, reliance has been placed on the decision of this Court in *Ammeerunnissa Begum and others v. Mahboob Begum and others*¹. We are not impressed by this argument. In the case of *Ammeerunnissa Begum*¹ it was obvious that the Legislature had singled out two groups of persons consisting of two ladies and their children out of those who claimed to be related to the deceased Nawab Waliuddowla and preventing them from establishing their rights under the personal law which governed the community, in Courts of law. Unconstitutional discrimination was thus writ large on the face of the Act impugned in that case. The position in the present case is very much different. Section 13 (2) does not validate the orders passed in the enquiry relating to the present case alone. It purports to validate orders passed between the two specified dates in respect of all the enquiries which were then pending. That is one important point of distinction. Besides, as we will point out later, the nature of the property in respect of which the petitioners make a claim is fundamentally different from that in the case of *Ammeerunnissa Begum*¹. The property in the latter case was heritable property succession to which had to be determined under the principles of the personal law applicable to the parties, while in the present case, the succession to Atiyat property does not come as a matter of right to the heirs of the last holder. Therefore, in our opinion, the argument based upon the decision of the case of *Ammeerunnissa Begum*¹ cannot succeed.

The challenge to the validity of section 13 (2) has taken another form before us. It was argued that during the prescribed period, a large number of cases were pending orders by the authorities concerned. By chance or accident, orders by the relevant authorities were passed in the present case and may have been passed in some others. But there may be other cases of a similar type on which orders may not have been passed by the relevant authorities during the prescribed period and in singling out cases in which orders have been passed the impugned provision has made a classification which is irrational and offends against Article 14. The accident that orders were passed in some cases and were not passed in some others cannot afford a rational basis for classifying the two sets of cases. During the course of arguments, however, it turned out that no factual basis had been made out in the petition on which this argument could be based. It is not alleged that there are any cases in which orders have not been passed and which would, therefore, fall outside section 13 (2). When this fact was put to the learned Attorney-General who argued for the petitioners, he fairly conceded that in the absence of the relevant material, the argument could not be sustained. Therefore, we do not think it is necessary to examine the merits of this argument, though we may add that, *prima facie*, classification made between cases decided and those not decided may not be irrational or unreasonable.

The learned Attorney-General then contended that in validating the orders passed by executive authority on the question of succession, section 13 (2) violates Article 14 because it is the right of every citizen to have questions of succession tried by a Civil Court. He argues that if the petitioners wish to make a claim in regard to the succession to the estate in question, they have a right to enforce their claim in a Court of Law and in so far as the impugned provision denies them that right, that amounts to discrimination against the petitioners which is violative of Article 14. It would be noticed that this argument is in substance, similar to the contention raised by the learned Attorney-General on the strength of the decision in the case of *Ammeerunnissa Begum*¹. In examining the validity of this argument, it is necessary to consider the nature of the property in respect of which the petitioners seek to make a claim by way of succession.

The legal nature of the jagir estate has been considered by the High Court in dealing with the Writ Petition filed by the widows of the late Nawab. Several Firmans to which reference has been made by the High Court indicate that on the death of the holder of the jagir, the estate devolved upon the State and though it was usually regranted to the person who was found to be the successor on enquiry, in theory, jagirs were resumed on the death of the holder of the jagir and their heirs did not automatically succeed to them. It is also clear that in their lifetime the Jagirdars were not permitted to alienate the property and that it was not necessary that on the death of the Jagirdar the estate should be granted to all his heirs either. It also appears that no suit relating to Jagir could be instituted in the Civil Court without the prior special permission of the Nizam. The Firman issued on 16th December, 1901, to which the judgment refers, shows that the heirs of the deceased holders of Jagirs could not insist upon their right to succeed to the estate because no Atiyat grant was heritable. Another Firman issued on 28th September, 1928, showed that the powers of the grantor of the Jagir could not be curtailed by the rules framed for the guidance of the Atiyat Courts and that the grantor had an absolute right either to regrant the estate to the successor or not. Therefore, the position appears to be that,

"the Jagir tenure consisted of no more than usufructuary rights in land to which the revenue law of the State did not apply; that the Jagirs were inalienable and terminable on the death of the grantee, each Jagirdar, though an heir of the deceased holder, was deemed a fresh grantee of the estate, the right to confer such an estate being uncontrolled, absolute and beyond the jurisdiction of the civil Courts".

It is true that on the death of a Jagirdar an enquiry was held about the succession to the said Jagir either by the Atiyat Courts or by a Commission or Tribunal specially appointed in that behalf; and it is also true that generally the property of the deceased Jagirdar was granted to the person who was held by the Nizam to be the successor of the deceased Jagirdar. But that does not affect the true legal character of the Jagir. This position is borne out by the previous Firmans issued by the Nizam in regard to the enquiry of the Atiyat estates. Circular No. 34 of 1341-F. prescribed rules for conducting enquiries and passing decisions in cases of Inam. This circular was subsequently superseded and in its place Circular No. 10 of 1338-F. was issued. The date of this latter circular is 13th June, 1929. Several rules are prescribed in the form of sections for holding enquiries and passing decisions in Inam cases. It is not necessary to refer to the sections of this Circular in detail. It may be enough to state that three classes of officers are contemplated by the Circular for holding the enquiry. They are given powers to hold the enquiry. The enquiries are intended to be held generally in accordance with the procedure prescribed in the Civil Procedure Code. Appeals are provided against the decision of one officer to the officer higher in rank, but the ultimate position appears to be clear; when the Nizam-e-Atiyat expresses his opinion and submits it to the Hon'ble the Revenue Member, the Revenue Member thereupon expresses his own opinion, and on considering all the opinions expressed in the enquiry, "the Nizam is graciously pleased to issue his Firman and the Firman thus issued will be binding on the parties". Thus, it appears that though formal provisions were made in regard

to the holding of the enquiry, the nature of the enquiry was essentially consultative and the Nizam was not bound by the decisions reached by the several officers authorised to hold the enquiry. The fact that the Nizam usually accepted the decision of the enquiry does not alter the legal position that the Nizam might well have refused to accept the opinion and might even have refused to make a grant of the estate to anyone among the several claimants. Therefore, even under the Circulars issued by the Nizam for holding enquiries into the questions of succession to Jagirs, the position appears to be clear that jagirs were not heritable and on the death of the Jagirdar, on principle and in theory, it was always a case of resumption and regrant.

If that be so, any person who claimed to be the successor of the deceased Jagirdar had no right to come to a Civil Court for establishing that claim. In fact, there is no claim to succession at all, the question of regrant being always in the absolute discretion of the Nizam. After the Rule of the Nizam came to an end, the only change that occurred was that on the death of the Jagirdar, the property vested in the State and could be regranted to a successor in the discretion of the State. Therefore, in our opinion, the argument that by denying the petitioners the right to establish a claim in the Civil Court, the impugned provision of section 13 (2) offends against Article 14 of the Constitution, cannot be sustained. The property in respect of which the claim is sought to be made is not like the property in the case of *Ammeerunnissa*¹ at all. In that case, the property was heritable and succession to it was governed by the rules of personal law. In the present case, there is no right to succession as such—whoever gets the estate as a result of the decision of the Chief Minister gets it by way of regrant made by the State. That is why we are satisfied that the challenge to the validity of section 13 (2) on the ground that it contravenes Article 14 cannot be sustained.

In view of the special character of the property in question, it is obvious that the petitioners cannot challenge the validity of section 13 (2) on the ground that it contravenes Article 19 (1) (f).

There is one more point which needs to be considered and that relates to the non-Atiyat estate left by the deceased Nawab Kamal Yar Jung. It appears that the Firman by which the Nizam appointed the first Commission of Enquiry refers to the estate of the deceased Nawab in general and is not apparently confined to his Atiyat estate. Similarly, the order passed by the Nizam that the Government should take possession of the deceased Nawab's property appears to have been implemented in regard to both Atiyat and non-Atiyat estates left by the Nawab. The Chief Minister's order confirming the report of the Special Tribunal subsequently appointed is likewise vague and may seem to cover both the Atiyat and non-Atiyat estates. The petitioners contend that whatever may be the position in regard to the Atiyat estate, the Chief Minister had no right to make an order in respect of non-Atiyat estate; indeed the Nizam himself could not have appointed an Enquiry Commission in respect of non-Atiyat estate and so the dispute in regard to the succession to the said estate must be left to be decided according to the personal law of the parties and it must be tried by the ordinary Civil Courts. This position is not disputed either by Mr. Viswanatha Sastri who appeared for the State or by Mr. Latifi who appeared for the respondents before us. Incidentally, we may add that it appears that litigation is pending in respect of this property between some of the parties in Civil Suit No. 139 of 1355-F. Since it is common ground before us that the non-Atiyat estate is not covered by the order passed by the Chief Minister, all that we wish to do in the present Writ Petition is to make it clear that the said order does not relate to non-Atiyat estate and that questions of title in respect of it will have to be tried in the Civil Courts.

In the result, both the Writ Petition and the Appeal fail and are dismissed with costs. One set of hearing costs.

K.L.B.

Petition and appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT : A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

N. A. Malbary and Bros., surat

.. Appellant*

v.

Commissioner of Income-tax Bombay North, Ahmedabad

.. Respondent.

Income-tax Act, (XI of 1922), sections 28 (1) (c) and 34—Penalty—Double imposition for same concealment—Effect of—First penalty on estimated assessment—Supplementary assessment based on correct income—Second penalty, without recalling first—Validity.

The assessee did not return any income or produce any accounts of its Bangkok branch for the assessment year 1951-52. The Officer issued a penalty notice for concealment on 31st January, 1952, and made the assessment on the same day, estimating the branch income at Rs. 37,500. The assessee filed his objections to the penalty notice on 11th March, 1952, but subsequently produced its Bangkok branch books, which disclosed an income of Rs. 1,25,520. In consequence, the Officer reopened the assessment under section 34 of the Indian Income-tax Act, 1922. In the meantime, on 22nd January, 1954, the Officer levied a penalty of Rs. 20,000 pursuant to his notice dated 31st January, 1952. Later, on the assessee's admission of the correct income of its branch to be Rs. 1,25,520, the Officer made a supplementary assessment and also issued another penalty notice for the same assessment year. After hearing the assessee's objections, the Officer passed a second order of penalty in the sum of Rs. 68,501. The assessee accepted the assessment, but appealed against both the penalties. The Tribunal cancelled the first penalty, but upheld the second, and the High Court, on Reference, agreed with the Tribunal. On further appeal by the assessee—

Held, that in respect of the same concealment two orders of penalty may not stand together or be enforced simultaneously. In the present case, however, the earlier order having since been cancelled, there remained only one order.

The Income-tax Officer, having assessed the income by estimate, levied a penalty on the basis of that estimate. But he had full jurisdiction to make the second order when he ascertained the true facts and realized that a much higher penalty could be imposed. The omission to recall the first order would not make the second order invalid.

Appeal from the Judgment and Order dated 13th April, 1960, of the Bombay High Court in Income-tax Reference No. 40 of 1959.

R. J. Kolah, Advocate and *J. B. Dadachanji*, *Q.C.* *Mathur* and *Ravinder Narain* of *M/s. J. B. Dadachanji & Co.*, for Appellant.

N. D. Karkhanis and *R. N. Sachthey*, for the Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—This is an appeal against a judgment of the High Court at Bombay given on a case stated to it under the Income-tax Act and answering in the affirmative the following question :

“Whether the levy of Rs. 68,501 as penalty for concealment in the original return for the assessment year 1951-52 is legal ?”

The question arose in the assessment of the appellant, a firm, for the year 1951-52 in respect of which the accounting year was the calendar year 1950. The assessee carried on business at Surat. It had a branch at Bangkok to which it exported cloth from India. The branch also made purchases locally and sold them. During the last World War the business at Bangkok had been in abeyance, but it was restarted after the termination of the hostilities.

In its return for the assessment year 1949-50, the assessee did not include any profit of the Bangkok branch, but stated that the books of account of the Bangkok branch were not available and that therefore its profit might now be assessed on an estimate basis, subject to action under section 34 or section 35 on production of statement of account. The assessment was thereupon made on the basis of profit at 5 per cent. on the export to Bangkok branch appearing in the Surat books.

For the year 1950-51, again, there was no reference to the Bangkok branch in the return, and a similar estimate was made for this year also. For the year 1951-52, also, the Bangkok business profits were not shown, but on January 11,

1952, the Income-tax Officer issued a notice to the assessee under section 22 (4) of the Act to produce the profit and loss account and balance-sheet with the relevant books. The assessee excused itself by alleging on January 29, 1952, that the books were at Bangkok and the profit and loss account and the balance-sheet could not be drawn up unless its partner, Hatimbhai A. Malbary, went there personally, and there was no certainty as to when he would go there and promising that in the following year these accounts for the calendar year 1950 would be produced. Thereupon, the Income-tax Officer made an estimate of the sales of the Bangkok branch at Rs. 7,50,000 and of the net profits at 5% thereon, amounting to Rs. 37,500. This assessment was made on January 31, 1952. On the same day he issued a notice under section 28 (3) of the Act requiring the assessee to show cause why a penalty under section 28 (1) (c) for concealment of the particulars of the income of 1950 should not be levied. The assessee was heard on this notice, and on January 22, 1954, the Income-tax Officer imposed a penalty of Rs. 20,000 on it, as its explanation was not acceptable.

In the meantime, assessment proceedings for the year 1952-53 had commenced, and this year also the assessee adopted a similar attitude as in the previous years. The Income-tax Officer was, however, insistent and, therefore, after various adjournments, the assessee had, on August 17, 1953, to produce the accounts and books of the Bangkok branch. It appeared from these books that in the calendar year 1950 the assessee had made a profit of Rs. 1,25,520. The Income-tax Officer thereupon commenced proceedings under section 34 of the Act against the assessee in respect of the assessment year 1951-52 and gave notice to the assessee to submit a return. The assessee then submitted a return stating therein correctly the profits for the calendar year 1950. The Income-tax Officer completed that assessment after directing the issue of a further notice under section 28 (3) on April 8, 1954, requiring the assessee to show cause why penalty should not be levied for deliberately concealing the particulars of his income of 1950. Pursuant to this notice the Income-tax Officer passed another order on February 28, 1957, imposing a penalty of Rs. 68,501. So there were two orders of penalty.

The assessee appealed to the Appellate Assistant Commissioner against both the aforesaid orders of penalty, but the appeals were rejected. There is no dispute as to the assessment of the income. The assessee then appealed to the Income-tax Appellate Tribunal. The Tribunal observed,

"It is indeed difficult to understand the action of the Department in splitting up one offence into two proceedings. So far as the levy on the basis of the 23 (3) assessment is concerned it appears to have no basis, as till that stage the Department had not succeeded in establishing and bringing home any guilt. It was still in the region of estimate. . . . The levy of Rs. 20,000 has to be remitted in full. The levy of Rs. 68,501 is entirely different. With the definite knowledge that the Income-tax Officer had obtained that the profit for the year was Rs. 1,25,520 he has clearly proved the guilt of concealment against the assessee. . . . The penalty is not at all excessive and accordingly confirmed."

The revenue authorities never questioned the cancellation of the first order of penalty.

Thereafter, the assessee obtained a Reference to the High Court of the question which we have set out at the beginning of this judgment. That question, it will be noticed, referred only to the penalty of Rs. 68,501 imposed pursuant to the second notice under section 28 (3) for concealing the particulars of the income of 1950. It has to be observed that in the return that was filed in the proceedings started under section 34, the assessee furnished correct particulars and it also produced the books. So it had not committed any default in connection therewith. The notice must therefore be taken to have been in respect of the original concealment of the income. The assessee knew—and this is what was found by the Tribunal and that is a finding of fact which is binding on a Court in a Reference—that its profits were Rs. 1,25,520 and it had not disclosed that profit originally nor produced the relevant books but permitted the Income-tax Officer to proceed on an estimate of that profit at Rs. 37,500. It was contended in the High Court that in respect of the same concealment there were thus two penalties involved, namely, one of Rs. 20,000 and the other of Rs. 68,501. The High Court agreed with the contention of the assessee that two penalties could not be levied in respect of identical facts but it held that the penalties

in this case had not been levied on the same facts. It observed that the original assessment was solely on the basis of an estimate and the second assessment was after knowledge of the full facts of the concealed income.

In this Court Mr. Kolah has urged that the second order for penalty was illegal because there was one concealment and in respect of that an order for penalty of Rs. 20,000 had earlier been made. He contended that there was no jurisdiction to make the second order of penalty while the first order stood and for that reason the second order must be treated as a nullity. He further stated that the fact that the first order was subsequently cancelled by the Tribunal would not set the second order on its feet, for it was from the beginning a nullity as having been made when the first order stood.

We are unable to accept this argument. It may be that in respect of the same concealment two orders of penalty would not stand, but it is not a question of jurisdiction. The penalty under the section has to be correlated to the amount of the tax which would have been evaded if the assessee had got away with the concealment. In this case, having assessed the income by an estimate, the Income-tax Officer levied a penalty on the basis of that estimate. Later, when he ascertained the true facts and realised that a much higher penalty could have been imposed, he was entitled to recall the earlier order and pass another order imposing the higher penalty. If he had omitted to recall the earlier order that would not make the second order invalid. He had full jurisdiction to make the second order and he would not lose that jurisdiction because he had omitted to recall the earlier order, though it may be that the two orders could not be enforced simultaneously or stand together. However, in the present case, the earlier order having been cancelled and no objection to the cancellation having been taken, we have only one order and that for the reasons earlier stated is, in our view, a legal order.

It was also said that when the first order of penalty was passed the Income-tax Officer was in possession of the full facts which would have justified the imposition of the higher penalty. It was pointed out that the first order of penalty was passed on January 22, 1954, while the books disclosing the real state of affairs had been produced before the Income-tax Officer on August 17, 1953. It was contended that if in spite of this he passed the order imposing a lower penalty, he had no right later to change that order. In support of this contention reference was made to *C. V. Govindarajulu Iyer v. Commissioner of Income-tax, Madras*¹. There it was argued that the original proceeding under section 23 (3) and a proceeding under section 34 in respect of the same period were different, and in the latter proceeding a penalty could not be imposed for a concealment in respect of the original proceeding. Rajamannar, C.J., rejected this contention and held,

“that so long as the proceedings under section 34 relate to the assessment for the same period as the original assessment, the Income-tax Officer will be competent to levy a penalty on any ground open to him under section 28 (1), even though it relates to the prior proceeding”.

He, however, proceeded to observe,

“There may be one possible qualification of his power, and that is when the default or the act which is the basis of the imposition of the penalty was within the knowledge of the Officer who passed the final order in the prior proceeding and if that Officer had failed to exercise his power under section 28 during the course of the proceeding before him. Possibly, in that case, he would have no power.”

Learned counsel for the appellant relied on this latter observation in support of his contention. We do not think that Rajamannar, C.J., wished to state this qualification on the power of the Income-tax Officer as a proposition of law. It was not certainly necessary for the purposes of the case before him. We do not wish to be understood as subscribing to it as at present advised.

But assume that this statement of the law is correct. It has no application to the present case. What is said is that if the default which entails the penalty was

within the knowledge of the authority when it passed the final order in the prior proceeding no penalty could be later imposed. Now Rajamannar, C.J., was not dealing with a case in which two penalties had been imposed. The case before him was one in which no return had been filed pursuant to a general notice but subsequently section 34 proceedings had been started and resulted in an assessment and an order imposing a penalty was thereupon passed. The final order in the prior proceedings referred to by the learned Chief Justice must, therefore, be final assessment order in the prior proceedings. Now in the present case the final order in the prior assessment proceedings was made on January 31, 1952, and on that date the Income-tax Officer had no knowledge of the concealment of income of Rs. 1,25,520. Therefore it seems to us that the observation of Rajamannar, C.J., does not assist Mr. Kolah. We may also observe that the first order of penalty passed on January 22, 1954, was pursuant to a notice issued on January 31, 1952, in respect of which the assessee had offered this explanation on March 11, 1952. That notice was not concerned with any concealment that came to light from the production of the books on August 17, 1953, and, therefore, on this concealment the assessee had never been heard. In assessing a penalty on this notice subsequently acquired knowledge would be irrelevant.

The result is that the appeal fails and it is dismissed with costs.

V.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—B. P. SINHA, *Chief Justice*, A. K. SARKAR, M. HIDAYATULLAH, K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR. JJ.

Sultan Brothers Private, Ltd., Bombay

.. *Appellants**

v.

Commissioner of Income-tax, Bombay City-II, Bombay

.. *Respondent.*

Income-tax Act, (XI of 1922), sections 9, 10, 12 (3) and 12 (4)—Head of income—Lease of building—Cum-Furniture—One not incidental to other—Rent separately fixed, but enjoyment to be common, for hotel business—Mode of assessment—Whether income from property business or other sources.

A company was formed with the object of acquiring land and buildings and turning them into account by construction and reconstruction, decoration, furnishing and by leasing or selling them. The company acquired a plot of land, constructed a building thereon and furnished it with furniture, fixtures and fittings. The company let the building, furniture and fixtures for a period of six years, for the purpose of running a hotel by the lessee. Under the lease agreement, the monthly rent for the building was reserved at Rs. 5,950, separately from the monthly hire for the furniture and fixtures which was reserved at Rs. 5,000. In the company's assessment to income-tax, the question arose whether the entire income should be assessed under the head business or whether the rent for the building and the hire from the furniture should be assessed under separate heads of income, and if so, under which heads. The Income-tax Officer assessed the rent from the building under the head "income from property" and the hire charges for the furniture under "other sources". The Appellate Assistant Commissioner held that both the receipts should be jointly, assessed under the head 'other sources' under section 12 (4) of the Indian Income-tax Act, 1922. The Appellate Tribunal and the High Court held that section 12 (4) did not apply since, in their view, the letting of the building was not incidental to the letting of the furniture. On appeal, the company contended that the entire income fell to be assessed as profits from business under section 10, since the letting out of a fully-equipped hotel building was the letting out of what was, in its very nature, a commercial asset.

Held, (1) the income under the lease cannot be assessed under section 10 of the Indian Income-tax Act, 1922, as the income of a business.

A thing cannot, by its very nature, be a commercial asset. It is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on.

Whether a particular letting is business has to be decided in the circumstances of each case. Each case has to be looked at from the business's man's point of view to find out whether the letting was the doing of a business or the exploitation of the property by its owner.

When a building and plant, machinery or furniture are inseparably let, there is a new kind of income, and the Act contemplates the rent as a residuary head of income under section 12 (4).

Section 12 (4) does not contemplate that the letting of the building had to be incident to the letting of the plant, machinery or furniture. All that it contemplates is that the letting of machinery, plant or machinery should be inseparable from the letting of the buildings.

“Inseparable” under section 12 (4) does not mean that the plant, machinery or furniture must be affixed to the building. The language is not that the two must be inseparably connected when let, but that the letting of the one is to be inseparable from the letting of the other. The inseparability under section 12 (4) is an inseparability arising from the intention of parties. It matters not whether there are separate leases in respect of furniture and buildings, if the intention was to be enjoyed together, that the letting of the two should be practically one letting and that the letting of the one would not have been accepted without letting of the other.

(2) On the construction of the lease, that the intention of the parties was that the furniture and fixture and building should be enjoyed together and not one separately from the other and the conditions for the applicability of section 12 (4) are satisfied.

(3) The rent from building should be computed separately after making the allowances under section 12 (4), and the income from the furniture and fixtures should be computed separately after making the allowances under section 12 (3).

Appeal from the Judgment and Order dated 2nd July, 1959, of the Bombay High Court in Income-tax Reference No. 59 of 1958.

A. V. Viswanatha Sastri, Senior Advocate (*T. S. Diwanji*, Advocate and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates, of *J. B. Dadachanji & Co.*, with him), for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—The appellant, which is a limited company, is the owner of a certain building constructed on Plot No. 7 on the Church Gate Reclamation in Bombay which it had fitted up with furniture and fixtures for being run as a hotel. By a lease dated 30 August, 1949, the appellant let out the building fully equipped and furnished to one Voyantzis for a term of six years certain from 9 December, 1946 for running a hotel and for certain other ancillary purposes. The lease provided for a monthly rent of Rs. 5,950 for the building and a hire of Rs. 5,000 for the furniture and fixtures. The question in this appeal is how the income received as rent and hire is to be assessed, that is, under which section of the Income-tax Act, 1922 is it assessable? The appellant contends that the entire income should be assessed under section 10 as the income of a business or, in the alternative, the income should be assessed under section 12 as income from a residuary source, that is a source not specified in the preceding sections 7 to 11, with the allowances respectively specified in sub-sections (3) and (4) of that section.

For the assessment year 1953-54, the appellant was taxed under section 9 of the Income-tax Act in respect of the building and under section 12 in respect of the hire received from the furniture and fixtures. The Income-tax Officer held that the building had to be assessed under section 9 as it was the specific section covering it and there was, therefore, no scope for resorting to the residuary section, section 12, in respect of its income. The Appellate Assistant Commissioner held on appeal that the rent from a building could only be assessed under section 12 with the allowances mentioned in sub-section (4) where for the letting of the furniture and fixtures it was indispensable to let the building also and as that was not the case here the building had been rightly assessed under section 9. The appellant then appealed to the Income-tax Appellate Tribunal. The Tribunal confirmed the decision of the authorities below, holding that the allowances mentioned in sub-section (4) of section 12 could not be allowed, as the sub-section permitted them only where the letting of the building was incidental to the letting of the furniture and fixtures and, as that had not happened in the present case, the rent could not be assessed under section 12. It was also contended by the appellant before the Tribunal—a contention which does not appear to have been advanced at any earlier stage—that the entire income

should really have been assessed under section 10 of the Act inasmuch as the income taxed was from "the letting out of the totality of the assets which was the business of the assessee". The Tribunal rejected this contention also, holding that since there was a specific head in regard to income from property, namely section 9, the income from the property leased had to be computed under that section alone and referred to *United Commercial Bank, Ltd. v. Commissioner of Income-tax, West Bengal*¹ in support of this view.

Thereafter, at the request of the appellant, the Tribunal stated a case under section 66 (1) of the Act to the High Court at Bombay for decision of the following question :—

"Whether, on the facts and circumstances of the case, the income derived from letting of the building constructed on Plot No. 7 is properly to be computed under sections 9, 10 or under section 12 of the Income-tax Act."

The High Court answered the question as follows :—

"The income from the building will be computed under section 9, income from furniture and fixtures under section 12 (3) and that no part of the income is taxable under section 10."

The question framed is clearly somewhat inaccurate, for what the appellant contends in the first place is that the entire income, and not that from the building alone, should be assessed under section 10. This inaccuracy has not however misled anyone, and the matter has been argued before us without any objection from the respondent on the basis as if the question was in terms of the appellant's contention.

Now, it is beyond dispute that the several heads of income mentioned in section 6 of the Act and dealt with separately in sections 7 to 12 are mutually exclusive, each head being specific to cover the income arising from a particular source and that it cannot be said that any one of these sections is more specific than another : see *United Commercial Bank, Ltd. v. Commissioner of Income-tax*¹. Therefore a particular variety of income must be assignable to one or other of these sections.

A broad reference to sections 9, 10 and 12 may now be profitably made. Section 9 provides for the payment of tax under the head "Income from property" in respect of the *bona fide* annual value of buildings or lands appurtenant thereto of which the assessee is the owner. Certain buildings are exempted, but it is not necessary to refer to them. This section also sets out the method of calculation of the annual value of the property on which the tax is to be assessed. It is important to note here that under this section a building has to be assessed to tax on its annual value irrespective of the rent received from it, if any. Section 10 deals with profits and gains of business, profession or vocation. This section also provides the method of computing the income and the allowances that the assessee is entitled to deduct in making the computation. Section 12 is the residuary section covering income, profits and gains of every kind not assessable under any of the heads specified earlier. It follows that if the income now under consideration is taxable under section 9 or section 10, then it cannot be taxed under section 12. This is not in dispute.

The first contention of the appellant, as already seen, is that the assessment should be made under section 10 as of income from a business. The reason for this preference is that under that section it would be entitled to much larger allowances as deductions in the computation of the income than it would be under either section 9 or section 12. The appellant put the matter in this way. Letting out of a commercial asset is a business, and what it did was to let out a commercial asset, namely, a fully equipped hotel building. It also said that the lessor's covenants in the lease showed that in making the lease, the appellant was carrying on a business and not letting out property. This is somewhat different from the way in which it was

1. (1957) 32 I.T.R. 688 : (1958) S.C.J. 46 : (S.C.) 26 : A.I.R. 1957 S.C. 918. (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An.W.R.

put before the Tribunal. The argument advanced before the Tribunal was not advanced in this Court and need not, therefore, be considered. It is indeed not very clear.

A very large number of cases was referred to in support of this contention, but it does not seem to us that much assistance can be derived from them. Whether a particular letting is business has to be decided in the circumstances of each case. We do not think that the cases cited lay down a test for deciding when a letting amounts to a business. We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business, because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature.

The object of the appellant company no doubt was to acquire land and buildings and to turn the same into account by construction and reconstruction, decoration, furnishing and maintenance of them, and by leasing and selling the same. The activity contemplated in the aforesaid object of the company, assuming it to be a business activity, would not by itself turn the lease in the present case into a business deal. That would follow from the decision of this Court in *East India Housing and Land Development Trust, Ltd. v. Commissioner of Income-tax*¹, where it was observed that

“the income derived by the company from shops and stalls is income received from property and falls under the specific head described in section 9. The character of that income is not altered because it is received by a company formed with the object of developing and setting up markets.”

Now the cases on which learned counsel for the appellant especially relied were cases of the letting out of plant and machinery, in some instances along with the factory buildings in which they had been housed. In all of them, except one, which we will presently mention, the assessee had previously been operating the factory or mill as a business and had only temporarily let it out as it was not convenient for him at the time to carry on the business of running the mill or factory. In these circumstances, it was held that by letting out the plant, machinery and building the assessee was still conducting a business though not the business of running the mill or factory.

In *Commissioner of Income-tax v. Mangalagiri Sri Umamaheswara Gin and Rice Factory, Ltd.*², the assessee who was the owner of a fully equipped rice mill which it had constructed for its own trade but had never worked it, decided to lease it out to another person. It was held that the income was income from business. The reason given by one of the learned Judges, Krishnan, J., was, “the rent received is not only for the use of the mill but also to cover the necessary wear and tear” and the lease was of the mill as a working concern. Beasley, J., agreed, but, perhaps, with a certain amount of hesitation. In the later case of *Commissioner of Income-tax v. Bosotto Brothers, Ltd., Madras*³, which concerned income from the letting out of a fully equipped hotel which had previously been run by the assessee himself as a hotel, Krishnaswami Ayyangar, J., felt himself bound by the *Mangalagiri Gin and Rice Factory case*², and apparently for that reason only decided to agree with his colleagues that the case might fall under section 10. Mockett, J., thought that what was done was to lease out an undertaking of a hotel known as a hotel business and, in that view, he agreed that the case might come under section 10.

It seems to us that *Bosotto Brothers, Ltd., case*³ would have no application, because it cannot possibly be said in the case in hand that the appellant had let

1. (1961) 42 I.T.R. 49.

2. (1927) 51 M.L.J. 360 : I.L.R. 50 Mad. 529 : (F.B.)

3. (1940) 1 M.L.J. 319 : I.L.R. (1940) Mad.

178.

out any business undertaking. Admittedly, it never carried on any business of a hotel in the premises let out or otherwise at all. Nor is there anything to show that it intended to carry on a hotel business itself in the same building, even if it had the power under its memorandum to do so, as to which a great deal of doubt may be entertained. In *Mangalagiri Gin and Rice Factory case*¹, what appears to have been really let out was the plant and machinery, and the case was decided on the basis of the wear and tear caused to them. Furthermore, in that case it does not appear at all to have been contended that section 9 had any application. Whether that case was rightly decided or not, is not a question that properly arises in this case, for none of the considerations which led to the decision arrived at there, exists here; there is no question of any wear and tear to machinery nor of a letting out of any working concern. Besides, the cases of *Mangalagiri Gin and Rice Factory*¹, and *Bosotto Brothers, Limited*², were both decided before sub-section (4) of section 12 was enacted. Sub-section (4) covers a case where a building and furniture are inseparably let out. It cannot be said what the decision in those cases would have been if section 12 (4) was then in existence. We do not think that it would be profitable to refer to the other cases cited at the Bar for they carry the matter no further.

Learned counsel for the appellant also relied on certain clauses in the lease and a clause in the memorandum of the appellant company to show that the lease amounted to the carrying on of a business. We shall now turn to these provisions. Clause 3 (b) of the memorandum gave power to the appellant to manage land, buildings, and other property and to supply the tenants and occupiers thereof refreshment, attendants, messengers, light, waiting room, reading room, meeting room, libraries, laundry convenience, electric conveniences, lifts, stables and other advantages. The contention was that this clause in the memorandum gave the appellant a power to carry on a business of the nature of running a hotel. We do not think, it did. But, in any case, by the lease, none of the objects mentioned in this clause was sought to be achieved. We find nothing in the lessor's covenants, to some of which we were referred to bring the matter within clause 3 (b) of the memorandum. None of these clauses support the contention that by granting the lease, the appellant did anything like carrying on the business of running a hotel. Thus clause (a) is a covenant for quiet enjoyment. Clause (b) provides for a renewal of the lease of the demised premises being granted to the lessee for a further term of six years at his request. Clause (c) deals with payment of municipal bills and similar charges and ground rent. Clause (d) provides that the lessor shall, during the continuance of the lease and on its renewal, provide various things which included furniture, pillows, mattresses, gas-stoves, bottle-coolers, refrigerators, lift, electric fittings and the like and also paint the outside of the building with oil once in five years and keep the building insured. These are ordinary covenants in a lease of a furnished building. These do not at all show that the lessor was rendering any service in the hotel business carried on by the lessee or in fact doing any business at all. On the facts of this case, we are unable to agree that the letting of the building amounted to the doing of a business. The income under the lease cannot, therefore, be assessed under section 10 of the Act as the income of a business.

The next question is about sub-section (4) of section 12. The relevant part of section 12 may now be set out.

Section 12.—(1) The tax shall be payable by an assessee under the head 'Income from other sources' in respect of income, profits and gains of every kind which may be included in his total income if not included under any of the preceding heads.

.....

(3) Where an assessee lets on hire machinery, plant or furniture belonging to him, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub-section (2) of section 10.

1. (1927) 51 M.L.J. 360 : I.L.R. 50 Mad. 529.

2. (1940) 1 M.L.J. 319 : I.L.R. (1940) Mad. 178.

(4) Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of the clauses (iv), (v), (vi) and (vii) of sub-section (2) of section 10 in respect of such buildings.

To clear the ground it may be stated here that once section 10 is found inapplicable to the case, there is no dispute that the income from the hire of the furniture and fixtures was rightly assessed under section 12 after providing for the allowances mentioned in sub-section (3) of that section. The only dispute that then remains is whether the building is to be assessed under section 9 which of course will have to be on the basis of its annual value or whether the rent from the building has to be assessed under section 12 after the allowances mentioned in sub-section (4) have been deducted.

We have earlier said that section 12 can only apply if no other section is applicable; because it deals with the residuary head of income. Now sub-section (4) of section 12 only deals with certain allowances, and it obviously proceeds on the basis that the income mentioned in it, namely, that from the buildings when inseparably let with plant, machinery or furniture is not income falling under any of the specific heads dealt with by sections 7 to 11, and is, therefore, income falling under the residuary head contained in section 12. There a preliminary difficulty arises. In respect of buildings—and with them alone sub-section (4) of section 12 is concerned—as already seen, the owner is liable to tax under section 9 not on the actual income received from it, but on its annual value, and, in fact, quite irrespective of whether he has let it out or not. How then can it be said that the rent received from a building could at all come under section 12? In other words, why can it not be said that the specific section, that is, section 9, covers the case, and the income from the building cannot be assessed under section 12 and no question of giving any allowances under section 12 (4) arises? It has sometimes been suggested as a solution for this difficulty that sub-section (4) of section 12 applies only when the building is let out by a person who is not the owner, because such a case would not come under section 9. Counsel for neither party, however, was prepared to accept that suggestion. Indeed that suggestion has its own difficulty. Under sub-section (4) of section 12 the assessee becomes entitled, among others, to an allowance in accordance with section 10 (2) (vi) which is on account of depreciation of the building “being the property of the assessee” from which it follows that sub-section (4) of section 12 contemplates the letting of the building by the owner. Sub-section (4) of section 12 must, therefore, be applicable when machinery, plant or furniture are inseparably let along with the building by the owner. If sub-section (4) of section 12 is to have any effect—and it is the duty of the Court so to construe every part of a statute that it has effect—it must be held that the income arising from the letting of a building in the circumstances mentioned in it is an income coming within the residuary head. If a person cannot be assessed under section 12 in respect of the rent of a building owned by him, sub-section (4) will become redundant; there will be no case in which the allowances mentioned by it can be granted in computing the actual income from a building. An interpretation producing such a result is not natural. We must, therefore, hold that when a building and plant, machinery or furniture are inseparably let, the Act contemplates the rent from the building as a residuary head of income.

The next question is, does the present letting come within the term of sub-section (4) of section 12? That provision requires two conditions, namely, that the furniture should be let and also buildings and the letting of the buildings should be inseparable from the letting of the furniture. Now here both furniture and building have no doubt been let. The question is: Are they inseparably let? The High Court does not appear to have answered this question, for it was of the view that not only must the two be inseparably let out, but also that “the primary letting must be of the machinery, plant or furniture and that together with such letting or along with such letting, there is a letting of buildings”. The High Court held that the primary letting in the present case was of the building and, therefore, deprived the appellant

In the result we answer the question framed thus : The rent from the building will be computed separately from the income from the furniture and fixtures and in the case of rent from the building the appellant will be entitled to the allowances mentioned in sub-section (4) of section 12 and in the case of income from the furniture and fixtures, to those mentioned in sub-section (3), and that no part of the income can be assessed under section 9 or under section 10. The judgment of the High Court is set aside. The appellant will be entitled to the costs here and below.

V.B.

Appeal allowed.

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GROWTH OF INTERNATIONAL JUDICIARY : THE INDIAN PARTICIPATION AND EXPERIENCE.

By

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Apart from international conferences, conventions and treaties, international judicial institutions—Courts and tribunals play a useful role in the growth, development and maintenance of just and proper international order.¹ The institution of arbitration for peaceful settlement of disputes was a popular practice known to ancient Greece, Rome and India. However, submission of conflicts between States for settlement through adjudication machinery in accordance with international law did not emerge institutionally before the beginning of the present century. For the first time the Permanent Court of Arbitration came into existence in 1899 as an efficacious judicial mechanism to take its first pride place in the community of nations. It was really a leap forward on the famous *Alabama Claims case*², 1872 between United States and Great Britain. But at the same time powers, functions and procedure of the Permanent Court of Arbitration were seriously curtailed, limited and reduced by the contracting parties with regard to justiciable and political matters involving questions of national honour, national independence, sovereignty and domestic jurisdiction etc. The Permanent Court of Arbitration was neither 'permanent' nor a 'court of law' inasmuch as "it was not itself a deciding tribunal but only a list of names"³ of arbitrators chosen by the disputant parties whenever necessity was felt. It, therefore, not only affected the administration of international justice but also the uniform growth of practice, procedure and precedents in international law. The attempt for the creation of Court of Arbitral Justice with permanent judges "representing various judicial systems of the world and capable of ensuring continuity of arbitral jurisprudence" failed on account of mutual distrust and suspicion which was created on account of international rivalries between the East and the West⁴. It was the experience and exigencies of the First World War only which led to the establishment of the Permanent Court of International Justice in 1920 under the auspices of the League of Nations. The philosophy contemplated in the Covenant for the creation of the Permanent Court of International Justice as a part of peace machinery for the promotion of international peace, co-operation and justice was a remarkable phenomena in the community of nations. In fact the birth of the Court⁵ heralded a new hope of judicial settlement of disputes which were essentially legal in nature⁶. "Its record during the 17 years of its existence"

1. See H. Lauterpacht : The Function of Law in the International Community 1933; H. Lauterpacht : The Development of International Law by the International Court, 1958; The Transactions of the Grotius Society, Volumes 23 and 25 ; Hudson : The Permanent Court of International Justice, 1920-1942 ; Edward Hambro : The Case Law of the International Court, 1952 ; Oliver. J. Lissitzyn : The International Court of Justice; Moore : International Arbitrations and J.L. Simpson and Hazel Fox : International Arbitration, 1959.

2. McNair : International Law Opinions Vol. III, pp. 171-187.

3. Oppenheim : International Law, Vol. II, 7th Ed., p. 43 ; Hudson : International Tribunals, 1944, p. 21 ; Oliver, J. Lissitzyn : The International Court of Justice, 1951 at p. 10 observes that their authority has been impaired by lack of continuity in functions, personnel and traditions, the narrowness of the basis of their powers (in most cases agreements between the States immediately concerned), the differences in the personal characteristics and professional standing of the persons composing them, the suspicion that some arbitrators are unduly swayed by political considerations and the failure of some of the tribunals to support their decisions by publishing reasoned opinion".

4. The Russo-Japanese War, 1904-05 gave further impetus to colonial rivalries and conflicts between the major powers.

5. The Permanent Court of International Justice was established in pursuance of Article 14 of the Covenant of the League of Nations. The Court was in addition to the Court of Arbitration organised by the Hague Conventions of 1899 and 1907. For detailed discussion see Manley O. Hudson : World Court Reports, Vol. I, 1922-26, p. 18 ; H. Lauterpacht : The Development of International Law by the Permanent Court of International Justice, 1934.

6. Oppenheim : International Law, Vol. II, 7th Ed., 1958, pp. 3-5; Bentwich and Martin : A Commentary on the Charter of the U.N., 1950, p. 164 ; Article 36, the Statute of the Permanent Court of International Justice ; Dhyani, S. N. : Supreme Court Journal, 1958, p. 195 : Articles 12, 13 and 14 Covenant of the League of Nations, Article 36 (3) the Charter of the United Nations.

observes⁷, Professor Frederick L. Schuman "revealed it to be a body of great value, both as a tribunal to render judgments between States and as an agency to advise the League Council on legal questions. The Court rendered in all 32 judgments, 200 orders and 27 legal advisory opinions." These precedents, practices, and jurisprudence evolved by the Permanent Court of International Justice form the crust of the present and future international judicial administration. It is a happy augury that unlike the League Assembly and Council which had lost their importance, utility and necessity in late thirties the Court largely withstood unaffected by national prejudices and interests. It, therefore, characteristically came in the scheme of post-Second World War order which envisaged the proposals for the establishment of a General International Organisation in Dumbarton Oaks Conference, Washington, 1944⁸.

With the end of the Second World War in sight encouraging signs were visible towards the establishment of a new International Court of Justice. About 44 States⁹, accepted the invitation of the Government of United States to prepare a draft statute for the International Court of Justice by a Committee of Jurists under Green H. Hackworth (U.S.A.) as president. The Committee of Jurists referred the various issues for consideration at the United Nations Conference on International Organisation held at San Francisco from 25th April, to 26th June, 1945. There were divergent views in the sub-committees of the Conference on the efficacy, existence and future of the Permanent Court of International Justice in relation to the proposed new Court. It may be useful to quote the following extracts from the Report of the Committee of Jurists of the San Francisco Conference¹⁰ :

"In a sense, therefore, the new Court may be looked upon as a successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new statute, notably in Article 36, paragraph 4, and Article 37. Hence continuity in the progressive development of the judicial process will be amply safeguarded."

The Permanent Court of International Justice functioned well for twenty-five years with great perfection and judicial fervour inherent in any judicial system. The United Nations and the International Court of Justice owe a debt to it because of its valuable achievement and rich experiences. However, the times were running against it and it had to be wound up¹¹ "from the point of view of international law and practical reasons" as there was a general universal demand for a new Court within the frame work of the newly created organisation. But it must be understood that the creation of the new Court was not a break with the past one. On the other hand the statute¹², of the International Court of Justice is based upon

7. International Politics, 5th Ed., 1953, p. 178. This observation is also supported by E. Hambro who says "Most people agreed that such a Court must, in the future, as in the past, constitute one of the main features of any system for the pacific settlement of international disputes; and those who had any knowledge of the experience gained in the last twenty-five years considered that the methods of judicial settlement set up in 1920 and perfected since then were as good as could at present be devised". The Year Book of World Affairs, 1949, p. 190.

8. Chapter VII.—An International Court of Justice—There should be an international Court of Justice which should constitute the principal judicial organ of the Organisation; the Court should be annexed to and be a part of the Charter of the Organisation; the statute of the Court of International Justice should be either (a) the statute of the Permanent Court of International Justice continued in force with such modifications as may be desirable, or (b) a new statute in the preparation of which the statute of the Permanent Court of International Justice should be used as a basis; all members of the Organisation should *ipso facto* be parties to the Statute of International Court of Justice; conditions under which states not members of the Organisation may become parties to the statute of the International Court of Justice should be determined in each case by the General Assembly upon the recommendations of the Security Council. See Department of State Publications 2192, Conference Series 56.

9. American Journal of International Law, 1946, p. 4; Year Book of World Affairs, 1946-47, p. 105; the Year Book of World Affairs, 1949, p. 191; Russell and Muther: A History of the United Nations Charter, 1958, p. 865.

10. The United Nations Conference on International Organisation: Documents Vol. XIII, p. 334; See also Julius Stone: Legal Controls of International Conflict, 1954, pp. 110-111.

11. Hudson: American Journal of International Law, 1946, Vol. 46, p. 9; Wilcox and Marcy: Proposals for Changes in the United Nations, 1955, p. 376.

12. Article 92, Charter of the United Nations,

the statute of the old Court and since 24th October, 1945¹³, the statute of the new Court is in force.

The 'New' Court.

The Charter of the United Nations provides for the establishment of "an International Court of Justice" as one of the "principal organs¹⁴" of the United Nations. The relevant legal provisions of constitutional significance relating to the new Court are embodied in various articles of the Charter¹⁵, as well as in its own Statute¹⁶. The Permanent Court of International Justice, however, had no organic and inherent link with the League of Nations. On the contrary the present Court is a vital organ of the United Nations Organisation¹⁷, with membership of all powers—small or big who are *ipso facto* parties,¹⁸ to the Statute of the Court. The other States¹⁹ which are not members of the United Nations may become parties to the Statute of the International Court of Justice on conditions to be laid down in each case by the General Assembly on the recommendations of the Security Council. Switzerland is the only exception which without being a member of the United Nations is a party to the Statute of the Court. Further the States which are members of the United Nations may become a party²⁰, in cases before the Court. The Statute of the International Court of Justice directly limits the access to the Court to States only is outcome of the doctrine of sovereign equality of all States. The organs of the United Nations²¹, and its specialised agencies may request for advisory opinions only on any legal question from the Court. Therefore, individuals, corporations, international institutions and organisations do not have a *locus standi* before the Court. Although it may appear ridiculous this anomaly still exists in the Charter and in international law of today.²²

Composition of the Court.

The Court consists²³, of fifteen judges, no two of whom may be individuals of the same State. They are elected by the General Assembly and the Security Council from a list of persons nominated by the National Groups in the Permanent Court of Arbitration. An absolute majority²⁴ of votes is necessary both in the Assembly and in the Council in order to become a judge of the Court. It is interesting to note that permanent members of the Security Council do not have veto²⁵ power in the election of the judges. However, the scheme¹ of the Charter and of the Statute of the International Court of Justice seems to be to make the Court an independent, impartial and universal legal institution.

13. The Permanent Court of International Justice was finally abolished in January, 1947 see American Journal of International Law, 1946, p. 1.

14. Article 7, Charter of the United Nations. In Article 92 of the Charter the Court is to act as "the principal judicial organ" of the United Nations. However, there is nothing in the Charter, to prevent the United Nations from establishing parallel judicial agency for carrying on its functions, duties and obligations under the Charter and International Law.

15. See Chapter XIV.

16. See Articles 2, 3, 4, 8, 10, 11, 13, 18 and 20, etc.

17. The Permanent Court of International Justice was created by separate treaty in 1921, called "the Statute of the Court".

18. Article 93 (i), the Charter of the United Nations.

19. Article 93 (2), *ibid*.

20. Article 35, the Statute of the Court.

21. Article 96 (i) (2) of the Charter of the United Nations ; Article 34 (2) and (3), the Statute of the International Court of Justice.

22. An attempt to amend and broaden Articles 34 of the Statute of the International Court of Justice was made in the Committee of Jurists of the San Francisco Conference, 1944 in order to bring individuals, associations, corporations, colonies and dependencies within the framework of the Statute but it could not be achieved. The United Nations itself could not be a party to contested case before the Court. The United Nations may request advisory opinions only.

23. Articles 3, 4 and 8, the Statute of the International Court of Justice.

24. Articles 8, 10 and 12, the Statute of the International Court of Justice.

25. Article 10 (2), *ibid*.

1. Articles 16, 18, 19 and 31 *ibid* ; See also Chapter XIV, Charter of the United Nations.

Law applied by the Court.

The International Court of Justice is in a fortunate position to traverse within a vast and undelimited field of international jurisprudence which is constantly changing and developing in its extent, variety and quality. The modern nuclear era and the post-Charter period have witnessed a new technological legacy, which has tremendously affected the existing social, political, legal and economic values of human society. There is a rapid yearning for change to a better philosophy against dogmatic and archaic notions and conceptions which are not readily yielding to it. Although the old law, precedents and practices may be inadequate, inconvenient and undesirable to present transitional politico-legal order, yet these revolutionary changes have not still affected the course of administration of international law and dimensions of international justice. The International Court of Justice itself is not supposed to abolish, repeal, amend, adapt, create and apply law to meet ever changing conditions of international life. At the same time it would not be an exaggeration to say that the Court has been a useful instrument in maintaining as well as changing the rules of law for the solution of international controversies², of course with hesitancy. The Court is strictly bound by the letter and spirit of its own Statute³, which it is to abide and follow in all controversies brought before it. "No Court is expected, normally", observes⁴, Oliver, J., Lissitzyn, "to cut new law out of the whole cloth. It has to work within the existing legal, political and social frame work. Too radical a departure from the accepted standards and attitudes exposes a Court to the charge of usurpation of power and may put an end to its usefulness. This is especially true of an International Tribunal such as the International Court of Justice, whose powers rest entirely upon voluntary submission of the various states and whose decisions are not regularly enforced by the organised strength of the community." Although the Court is not restricted⁵, by the doctrine of *stare decisis* and its decisions are final and without appeal and have no binding force except between the parties and in respect of a particular case. Nevertheless, the desire to make use of previous decisions has been apparent since the establishment of the Permanent Court of International Justice.

The International Court of Justice⁶, has frequently referred to its previous decisions and to those of the Permanent Court of International Justice and still more frequently have the parties been careful to support the arguments they submitted

2. Reparation for Injuries, I.C.J. Reports 1949, p. 174; the Corfu Channel Case, I.C.J. Reports 1949, p. 5; the Competence of the General Assembly for the admission of a State to the United Nations, I.C.J. Reports 1950, p. 4; the Anglo-Norwegian Fisheries Case, I.C.J. Reports 1951, p. 116; for instance in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide the International Court of Justice observed that it is not correct to say that any State entitled to become a party to the Genocide Convention may move any reservations it chooses by virtue of its sovereignty. It is obvious that so extreme an application of the idea of sovereignty could lead to a complete disregard of the object and purpose of the Convention—See I.C.J. Reports, 1951 at p. 24. Similar in decision and hesitancy on the part of the world judiciary can be seen in the Right of Passages Case, I.C.J. Reports 1960, p. 39 where the Court has vaguely referred that local customs could be the basis of legal rights and obligations between States without elucidating a general rule of law for future practice.

3. Article 38, Statute of the International Court of Justice provides that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, apply international conventions; international custom as evidence of a general practice accepted as law; the general principles of law recognised by civilised nations; judicial decisions and teachings of the most highly qualified publicists; and the rules of *ex aequo et bono* if the parties agree.

4. The International Court of Justice, 1951, p. 16-17.

5. Article 59, Statute of the International Court of Justice. However, the Court adheres to well-known principles of *res judicata* and *estoppel* in deciding cases. See Delimitation of the Polish Czechoslovakian Frontier (question of Jaworziva) Series A/B No. 8 (1923), p. 37; Eastern Greenland, Series A/B No. 53 (1933), p. 23.

6. Edvard Hambro: The Case Law of the International Court, 1952, see introductory observations. The learned jurist further speaks that the judges of the International Court are disposed to follow precedents established by the Permanent Court of International Justice see also Corfu Channel Case, I.C.J. Reports, 1947-48, p. 28; Condition of Admission of a State to Membership in the United Nations, I.C.J. Reports 1947-48, p. 63; Year Book of World Affairs, 1948, p. 203-204.

to the Court with the weight of authorities taken from the decisions of the Permanent Court and of International Court of Justice. However, the International Court of Justice is free to strike a different line from the practice, procedure and precedents of the old Court.

The question also arises whether Article 38 of the Statute of the Court is all-inclusive in giving sufficient latitude to it to satisfy the growing and complex claims of international community. Hudson gives answer in affirmative that⁷, "the enumeration has proved itself generally satisfactory to the legal profession." But Professor Julius Stone on the other hand observes⁸, that the basis of this assertion is not clear. As a matter of fact the Court is entirely dependent on the parties seeking justice before it as to the exercise of law to disputed controversies and has little in determining the issue which it is called upon to decide at a particular occasion. It is also possible that the parties may avail the opinion of the arbitration board or tribunal and thereby may dispense⁹ with the necessity of a reference to the International Court of Justice.

Jurisdictional Issues.

The crucial issues concerning the Court's jurisdiction has outwitted human ingenuity on account of legal-political nature of the problem. The issue which has been confronting the jurists is whether to leave 'compulsory' jurisdiction on the basis of voluntary acceptance of the 'Optional Clause' as under Article 36 of the Statute or to prescribe it as an obligation for all parties. Principally the major powers¹⁰ have been opposed to it but later on agreed to adhere¹¹, to 'Optional Clause' on the basis of reciprocity. The U.S.S.R. and the United States have been opposed to it on political grounds. Consequently in all cases the jurisdiction of the Court depends on the consent or willingness of the parties to submit the dispute to the Court¹². Further the International Court of Justice has held¹³ "it must derive its jurisdiction to deal with merits of the case from the general rules laid down in Article 36 of the Statute. These general rules are based on the principle that the jurisdiction of the Court to deal with and decide a case on the

7. International Tribunals, p. 254.

8. Legal Controls of International Conflict, 1954, p. 133.

9. The complicated Indus Water Dispute between India and Pakistan was settled through the mediation of the World Bank after protracted negotiations for twelve years resulting in the Indus Water Treaty of 1960, Foreign Affairs Report, 1960, p. 153 ; India Quarterly, 1958, Vol. XIV, No. 3 (July-September).

10. For a fuller account of the history of 'Optional Clause' see Chapters XI and XXXIII in "A History of the United Nations Charter", 1958, by Russell and Muther.

11. France and Great Britain accepted the 'Optional Clause' in 1929 and deposited the ratification in 1931. The United States of America accepted and ratified the 'Optional Clause' as late as 1946 with maximum reservations which has reduced its acceptance to minimum extent. The U.S.S.R. is still out from the purview of the 'Optional Clause'; Oppenheim : International Law, Vol. II, 7th Ed., pp. 60 and 62 ; Julius Stone : Legal Controls of International Conflict, 1954, p. 126; M.O. Hudson : The Permanent Court of International Justice, 1920-42, p. 688.

12. In the Statute of Eastern Carelia (1923), Series B, No. 5, p. 27, (I.W.C.R.), p. 190 the Permanent Court of International Justice observed: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary also be given in a special case apart from any existing obligation"; in the Access to German Minority Schools in Upper Silesia (1928) Series A/B No. 40, p. 4, the Permanent Court of International Justice held that "Court's jurisdiction depend on the will of the parties. The Court is always competent once the latter have accepted the jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it". In the same judgment the Court observed that it was immaterial in what form the consent was given. The I.C.J. repeated that judgment in the Corfu Channel Case (1949) I.C.J. Reports p. 4 that further, there is nothing to prevent the acceptance, as in the present case from being effected by two separate and successive acts, instead of jointly and beforehand by special agreement as the Permanent Court of International Justice said in its judgment of 1928 "the acceptance by a State of Court's jurisdiction in a particular case is not subordinated to the observance of certain forms such as for instance the previous conclusion of a special agreement."

13. The Anglo-Iranian Oil Co., case, (1952) I.C.J. Reports p. 93. In this case the Court held that it has no jurisdiction while in Right to Passage Case, I.C.J. Reports, 1960, p. 34 it asserted its jurisdiction.

merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction." Nevertheless the jurisdiction of the International Court of Justice may be divided primarily into two categories, namely, the advisory jurisdiction¹⁴ and the contentious jurisdiction¹⁵.

Advisory Jurisdiction.

The Covenant of the League of Nations originally provided¹⁶, that the Court 'may give' an advisory opinion upon any disputed question referred to it by the Council or the Assembly. However, the basis of the present advisory jurisdiction is embodied in the Charter of the United Nations and in the Statute of the Court. Both these Charters authorise the International Court of Justice to give advisory opinions in accordance with procedure laid down respectively in them. The General Assembly and the Security Council may also request the Court directly to give an advisory opinion on any legal question. The other organs of the United Nations and specialised agencies upon the authorisation of the General Assembly may also request advisory opinions of the Court on legal questions arising within the scope of their activities. The States and individuals are excluded altogether from seeking the advisory opinion of the Court presumably on the idea that the Court is essentially of extra-national character of the mythical world community which may finally replace the existing sovereign States, by its own supra-national Legislature, Executive and Judiciary. Probably it is this underlying idea which is also inherent in the International Court of Justice. However, the States are entitled to appear before the Court whenever their interests are affected by the opinion of the Court.

The United Nations or its specialised agencies are, theoretically speaking, not bound by it and may accept or reject the same as it is merely a "advisory" opinion and nothing more. In practice, however, it is rather difficult¹⁷ for the General Assembly, or the Security Council to treat the well-considered opinion of the Court as merely persuasive. The object of advisory opinion is to elucidate, explain and inform these bodies with regard to a particular legal question. The Court's contribution in this regard is highly useful and valuable in assisting the United Nations in¹⁸ "establishing conditions under which justice and respect for obligations arising from treaties and other sources of international obligations can be maintained". The Court has been consistent in following certain principles in the exercise of advisory opinion. In the *Eastern Carelia case*¹⁹, it refused to answer the question put concerning provisions for autonomy of Eastern Carelia which was a disputed matter between Russia and Finland on the ground that Russia declined to recognise the competence both of the Council of the League of Nations and of the Court in the matter. Likewise the International Court of Justice has followed²⁰, its predecessor in the formulation of guiding principles for advisory opinion. These principles broadly speaking are as follows :

14. Article 96 (1), the Charter of the United Nations ; Article 65 (2), the Statute of the Court

15. Article 36, the Statute of the Court.

16. Article 14, the Covenant of the League of Nations.

17. None of the organs of the League of Nations or the United Nations have acted contrary to an advisory opinion sought by them ; see Lissitzyn, p. 32-33.

18. Preamble of the Charter of the United Nations.

19. (1923) Series B, No. 5, p. 5 at p. 29 ; the Court observed: "The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation in to the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court being a Court of Justice, cannot, even in giving advisory opinions depart from the essential rules guiding their activity as a Court".

20. Advisory opinion concerning condition of a State to Membership in the United Nations (1947-48) I.C.J. Reports p. 57 at p. 61 ; the Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania (1950) I.C.J. Reports, p. 65 at p. 71 ; Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) I.C.J. Reports, p. 15 at p. 19 ; Administrative Tribunal of I.L.O. (1956) I.C.J.R. p. 77 ; See also the old Court's opinion on the Interpretation the Greco-Bulgarian Agreement of 9th December, 1927, Series A/B—F.A.S.C. No. 45, p. 68 at p. 87 ;

(1) The Court's opinion is given not to the States²¹ but to the organ of the United Nations which is entitled to request and therefore no State whether a member of the United Nations or not, can prevent the giving of an advisory opinion which the United Nations consider to be desirable in order to obtain enlightenment as to the course of action it should take.

(2) Technically speaking the Court's opinion is merely of an advisory character and as such it has no binding force²², nevertheless in principle it should not be refused but it may decline to reply to the request for an opinion.

(3) Although the Court is incapable of giving advisory opinion on questions of political character²³, however, it cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provisions. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. The Court may also give opinion on questions couched in abstract forms. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.

(4) The object²⁴, of this request for an opinion is to guide the United Nations in respect of its own actions.

The advisory opinions of the Court have contributed invariably in the masterly analysis, exposition and evaluation of legal principles very much needed for the guidance of the General Assembly and the Security Council in the solution of acute international conflicts which without it may possibly drive the world towards a catastrophic confusion. It offers an opportunity to the Court as an organ of the United Nations to participate in the maintenance of peace and just order. Consequently the advisory opinions not only facilitate the task of the United Nations it is also a convenient method for the development of international law²⁵.

Contentious Jurisdiction.

Contentious Jurisdiction of the Court comes into play only when the parties to the dispute bring it before the Court for its decision. The jurisdiction of the Court depends on the consent of the disputant States without which it cannot exercise compulsory jurisdiction. Its jurisdiction¹ "comprises all cases which the parties refer to it." The Court does not *ipso facto* assume compulsory jurisdiction with regard to disputes between States merely because they are parties to the

Interpretation of the Greco-Turkish Agreement of 1st December, 1926, Series B.—No. 16 (1928), p. 1, at p. 16 and the consistency of Danzig Legislative Decrees with the the Constitution of the Free City, Series, A/B—F.A.S.C. No. 65, 4th December, 1935, p. 41 at p. 63 the Court observed that "the Court in performing its functions as an organ of international law, may consider municipal laws from the two entirely distinct standpoints. In the first place, it may have to examine municipal laws from the standpoint of their consistency with international law. The Court has sovereign power of adjudication on this point : "from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States in the same manner as do legal decisions or administrative measures". Secondly, the Court may find it necessary to interpret a municipal law, quite apart from any question of its consistency or inconsistency with international law". In the present case the consistency of certain Danzig legislative decrees with the Constitution of, Danzig were the subject matter of the Court's advisory opinion. The laws and the Constitution of Danzig had nothing to do from the standpoint of their consistency with international law. Consequently the municipal laws affecting human rights and fundamental freedoms become a concern of the Court as far back as 1935.

21. Interpretation of Peace Treaties 1950, I.C.J. R., p. 71.

22. *Ibid.*, See also Reservation to Genocide Convention (1951), I.C.J. R., p. 15.

23. Admission of a State to Membership in the United Nations (1947-48), I.C.J. R., p. 57 at p. 61.

24. Reservations to Genocide Convention (1951), I C.J.R., p. 11 at p. 19.

25. For a critical analysis of the purposes served by Advisory Jurisdiction see Manley O. Hudson. The Permanent Court of International Justice, 1920-1942, p. 532.

1. Article 36 (1) Statute of the Court ; Article 14 Covenant of the League of Nations provided that "The Court shall be competent to hear and determine any dispute of an international character which the parties may submit to it.

Statute or are members of the United Nations. It may exercise jurisdiction over disputes only and exclusively when brought before it by the disputant parties." "The consent of the States², parties to a dispute, is the basis of the Court's jurisdiction in contentious cases."

On the other hand the Charter provides³ that "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." It appears from interpretation of the foregoing provisions that the Security Council may recommend⁴ to the parties to refer all such legal disputes to the Court for solution. In other words parties are obliged, their willingness or consent being immaterial, to refer such dispute to the Court. However, this interpretation according to which Article 36 (3) of the Charter would provide a kind of compulsory jurisdiction of the Court, is doubtful.⁵ Article 36 (1) of the Statute of the Court authorises the parties to confer jurisdiction on it in "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." The purpose of the enumeration of the scope of Court's jurisdiction is intended to cover all such international treaties, conventions, agreements, awards, instruments, pacts and constitutions which contain provisions for compulsory reference of disputes arising out of such treaties or instruments for their interpretation.⁶

Optional Compulsory Jurisdiction.

The Court also exercises quasi-compulsory jurisdiction under Article 36 (2) of the Statute known as 'Optional Clause', whereby members may declare "that they recognise as compulsory *ipso facto* and without special agreement in relation to any other members accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning :

- (a) the interpretation of a treaty,
- (b) any question of international law,
- (c) the existence of any fact which, if established,

would constitute a breach of an international obligation."

Such a declaration might be made⁷ "unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time." The 'Optional Clause⁸' is not in the nature of a 'special agreement' within the meaning of the term used in Article 36 (2) of the Statute. But it is a general agreement in so far as the States by making the declaration referred to in Article 36 (2), in relation to another agree to recognise the jurisdiction of the Court in all legal disputes, in case other party brings the dispute before the Court. It would be a misnomer to say that the Court is granted compulsory jurisdiction by its own constitution. For, if a State which has made such a declaration under Article 36 (2) of the Statute brings a dispute with another State before the Court by a unilateral application in conformity with Article 40 of the Statute, the other party is obliged to recognise the jurisdiction of the Court only if it, too, has made the same declaration. In other words for all future possible legal disputes a State accepting the obligations subject to reservation if any, may declare to bind itself in relation to other State which has also made a similar declaration to that effect. "The unilateral declaration of one State⁹"

2. Interpretation of Peace Treaties (1950), I.C.J.R., p. 71.

3. Article 36 (3), Charter of the United Nations.

4. Article 25, *ibid*.

5. Summary Report of the Committee of Jurists of U.N.C.I.O. Documents, 1945.

6. Article 30, Treaty of Cession of the French Establishments of Pondicherry, Karaikal, Mahe and Yanam 1947 ; Articles 30 and 40, Constitution of the International Labour Organisation, 1919 ; Article 11, Convention on the Prevention and Punishment of the Crime of Genocide, 1948; Article 8, the Brussels (Western Union) Alliance, March 7, 1948; Article 8, the World Health Organisation and Articles 75, Constitution of the World Health Organisation.

7. Article 36 (3), the Statute of the Court.

8. Kelsen : The Law of the United Nations, 1950, p. 521-22.

9. Kelsen : The Law of the United Nations, p. 526.

observes Kelsen "together with the unilateral declaration of another constitute an agreement" of a universal character operative against every opponent which has itself accepted the obligation and is in that respect always conditional. The jurisdiction of the Court is not compulsory or obligatory—it is only *quasi*-obligatory, namely arises from the option of a State which without any agreement is willing to adhere to the obligatory jurisdiction of the Court with regard to certain specific legal disputes for which it binds itself to other States which have accepted corresponding parallel obligations or similar conditions.¹⁰ We have already noted that major powers¹¹ did not favour compulsory jurisdiction of the Court due to constitutional difficulties or ideological or political reasons. The smaller powers on the other hand were generally in favour of compulsory jurisdiction of the Court. However, a balance had to be arrived at between the compulsory and voluntary submission of legal disputes to the Court and the outcome was in the nature of optional compulsory submission of disputes as the only 'inevitable' and 'practical' course.

The 'Optional Clause' has been generally accepted by several States¹², including United States, France, the United Kingdom of Great Britain and India, etc. But most of the declarations¹³ are accompanied by reservations excluding certain types of disputes from the jurisdiction of the Court. Although during 1921 the jurisdiction of the Court was accepted and recognised unconditionally and without limitations, in some of the declarations certain kind of disputes were excluded from the purview of Article 36 (2) of the Statute. It was in fact the League Assembly which suggested the possibility of¹⁴ "reservations either in connection with a certain class of dispute or, generally speaking, in regard to the precise stage at which the dispute may be laid before the Court". It was a prelude to subsequent reservations which States began to make infrequently in Article 36 (2) of the Statute of the Court. The further impetus was given to this practice by the League Assembly itself that¹⁵, "the reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specially to certain classes or lists of disputes, and that these different kinds of reservations can be legitimately combined." The Geneva Protocol¹⁶, 1924 echoed the idea of reservations by which some kinds of

10. In the *Right of Passage* case (Preliminary Objections) 1957 I.C.J.R. p. 141, India contended that the Court is without jurisdiction to entertain the Application of Portugal on the ground that the Portuguese Declaration of Acceptance of the jurisdiction of the Court of 19th December, 1955, is invalid and incompatible with the object and purpose of the Optional Clause as it offends the basic principle of reciprocity underlying it. The Court while rejecting India's objection observed, "It is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which Acceptance is mutually binding."

11. Oliver, J. Lissitzyn p. 63 where the learned author quotes a delegate 'that the U. S. S. R. was guided by the necessity of defending the interests of the socialist State, the United States was apprehensive of opposition in the Senate to the ratification of the Charter and the Statute.' Similarly Russal and Muther p. 885 describes the attitude of the U. S. and Soviet Governments that they would not be able to ratify or would be obliged to withhold their acceptance of the Statute, if it contained the principle of compulsory jurisdiction.

12. Year Book of International Court of Justice, 1947-48, p. 127.

13. Thus, e.g., the United States recognised the jurisdiction of the Court in disputes concerning the matters enumerated in Article 36, paragraph 2 of the statute "Provided, that this declaration shall not apply to (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America; or (c) disputes arising under a multi-lateral treaty, unless (i) all parties to the treaty affected by the decision are also parties to the case before the Court, (ii) the United States of America specially agrees to jurisdiction, are provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

14. Hudson; *The Permanent Court of International Justice*, 1920-1942, op. cit. p. 467.

15. Records of the Ninth Assembly, plenary, p. 183.

16. Article III "The signatory States undertake to recognise as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of

disputes could be excluded from the scope of Article 36 (2) of the Statute. The general pattern of reservations limiting the jurisdiction of the old¹⁷ and new Court¹⁸ is parallel in its nature and extent. They are summarised by Professor Julius Stone as below :

(1) *Past Disputes*, presumably because of the frequently historic nature of certain of these in which conceptions of the national honour and interest have in time become entangled.

(2) Disputes for which treaties in force provide other means of settlement the liberty of election among recourses thus reserved. A special form of this is the provision in the British acceptances that submission by the party to the Council of the League shall suspend the Court's exercise of jurisdiction.

(3) Disputes concerning questions which by International Law fall exclusively within or essentially within their domestic jurisdiction.

(4) Disputes between members of the League who are Members of the British Commonwealth of Nations.

(5) Disputes as to question of territorial statuts.

(6) Disputes arising out of particular named treaties.

(7) Time limit.

Manley O. Hudson adds two more categories, namely (a) Disputes for which a solution is not reached through diplomatic channel and (b) Disputes affecting constitutional principles of a State which restrict the jurisdiction of the Court. These reservations have shaken stability and certainty in application of legal rules to certain situations which are left outside the pale of international law. It has, therefore, diminished the efficacy of the 'optional clause' below exceptions and hopes¹⁹ of many jurists who are striving hard for an all embracing international judiciary.

India and the 'Optional Clause'.

Indian participation and contribution in international affairs is not a new phenomena. Ideals of one-world community with one religion of humanity and the maintenance and preservation of just peace on the basis of co-existence and non-violence have been the basic instruments of India's national and international policy in the past²⁰ and is in the present as well. In the recent years exigencies of the First World War compelled India to help in money, men and materials the allied powers in defence of freedom and democracy against wanton German aggression. In appreciation of her services India²¹, although a part of the British Empire, participated as an original member along with other powers in the Peace Conference of Paris, 1919. The Peace Conference envisaged *inter alia*, in the first place, an agency—the League of Nations—for the prevention of war. It was the Covenant of the League of Nations which in turn provided²² for the creation of an international judiciary for the settlement of legal conflicts with a view to lessen tension and reduce friction between States. With this object in view India on December 18, 1920 annexed its signature to the Statute and deposited its ratifica-

any state, when acceding to the special protocol provided for in the said article and opened for signature on 16th December, 1920, to make reservations compatible with the said clause."

17. Hudson 1943, p. 468-472.

18. J. Stone 1954, p. 126 ; Lissitzyn, Oliver J., 1951, p. 65-67 ; Brierly, J. B. 1949, p. 258-260 and Hans Kelsen ; Law of the United Nations 1950, p. 526.

19. For instance the United States had advanced reasons for these reservations that, 'it would be reckless to proceed precipitately' that the Court 'has yet to win confidence of the world community' and that 'international law has not yet developed the scope and definiteness necessary to permit international disputes generally to be resolved by judicial rather than political tests ; Compulsory jurisdiction, International Court of Justice, Hearings on Senate Rule 196 11, 12, & 15 July, 1946, pp. 43-45

20. S. V. Viswanath : International Law in Ancient India, Bombay, 1925 ; the Indian Year Book of International Affairs, 1952, Volume I, p. 97.

21. At the Peace Conference, 1919 India was represented by H. H. Sir Ganga Singh, the then Ruler of Bikaner.

22. Article 14.

tion²³ on August 4, 1921. So far as the 'optional clause' was concerned, India made a declaration accepting the Court's compulsory jurisdiction on September 19, 1929 in conformity with Article 36 (2) of the Statute of the Court subject to following conditions²⁴ :

(a) other than disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement ; and (b) disputes which the Government of any other member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree ; and (c) disputes with regard to questions which by international law fall exclusively within the jurisdiction of India ; and (d) subject to certain conditions any dispute which has been submitted to and is under consideration by the Council of the League of Nations.

India deposited the ratification of the acceptance of the 'optional clause' on February 5, 1930 with the Secretary General of the League of Nations. On October 2, 1939, India notified the Secretary General that its "acceptance of the 'Optional Clause' will not be regarded as covering disputes arising out of events occurring during the present hostilities". By a declaration of February 28, 1930, communicated to the Secretary General on March 7, 1940, India terminated its declaration of September 19, 1929. By another declaration of the same date India accepted²⁵ the jurisdiction of the Court for a period of five years from February 20, 1940 and thereafter until such time as notice may be given to terminate the acceptance, over all disputes covered by the declaration of September 19, 1929, excepting, however, "disputes arising out of events occurring at a time when the Government of India were involved in hostilities". This declaration was not subject to ratification.

The Government of India in 1955 filed a further declaration with the United Nations accepting the compulsory jurisdiction of the International Court of Justice which more or less followed the policy of U.S.A., Mexico, Pakistan, Liberia, France and South Africa of excluding domestic disputes as determined by the Government of India from the jurisdiction of the Court. India again on January 7, 1956, notified the Secretary General of the denunciation of its previous declaration of acceptance, for which it simultaneously substituted a new declaration incorporating reservations which were absent from its previous declaration.

The latest declaration on World Court jurisdiction was filed by India on September 14, 1959.¹ India, however, in conformity with Article 36 (2) of the Statute of the Court accepted the jurisdiction of the Court until such time as notice may be given to terminate such acceptance, as compulsory, over all disputes arising after January 26, 1950, with regard to situations or facts subsequent to that date, other than, "(1) Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement ; (2) disputes with the Government of any State which, on the date of this declaration, is a member of the Commonwealth of Nations ; (3) disputes in regard to matters which are essentially within the jurisdiction of the Republic of India ; (4) disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any function pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of India has accepted the obligations ; (5) disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute, or when the acceptance of the Court's compulsory jurisdiction on behalf of a party to the

23. Manley O. Hudson : Permanent Court of International Justice, 1920-1942, p. 667.

24. *Ibid* p. 667 ; Hudson : World Court Reports 1922-1926, Vol. I, p. 38 Analogous reservations were also made by Australia on 20th September, 1930 ; New Zealand, September 20, 1929 etc.

25. Year Book of the I. C. J. 1947-48, p. 136.

1. Asian Recorder 1959, p. 2903 ; *The Times of India*, 19th September, 1959.

dispute was deposited or ratified less the twelve months prior to the filing of the application bringing the dispute before the Court : and (6) disputes which the Government of any State with which, on the date of an application to bring a dispute before the Court the Government of India has no diplomatic relations."

The reasons for a new declaration for India immediately after 1956 to exclude the compulsory jurisdiction of the Court were mainly in the interest of India's territorial integrity and sovereignty and more particularly the experience² of India in the *Right to Passage Case* in which the Government of Portugal invoked the 'optional clause' and suddenly took India before the World Court in order to reimpose her galling yoke on the Dadar, Daman and Nagar Haveli areas which had successfully thrown off the Portuguese colonialism in July, 1954. It is of course an open and unvarnished truth that the reservations give a free hand to a State unhampered and unhindered by any restrictions whatsoever in the settlement of important international disputes of political character, in other words, the maintenance or change of *status quo* in particular situation.

The general submission of disputes to the International Court of Justice is steadily falling down probably because the Court has no inherent authority to enforce its judgments against a recalcitrant party or parties³. "The International Court of Justice" observes⁴ Professor Quincy Wright "has been less frequently utilised than was its predecessor in the League of Nations period, the Permanent Court of International Justice. The organs of the United Nations have seldom asked for advisory opinions on matters affecting their own competence and States seldom submit for decision disputes of political importance. Accession to the 'Optional Clause' of the Court Statute have been less numerous, in proportion to the number of States, parties to the Statute, than was true in the League of Nations period".

There is an unfailing anxiety in Afro-Asian minds in particular that the Court also could not free itself from national, political and ideological considerations. For instance the Indian experience of the World Court in the *Right to Passage case* has not been very satisfactory in as much as the international judiciary did not emphatically recognise the sovereign right of the dependent people to throw off the vestiges of foreign domination and oppression. It is true that the Court in the *Right to Passage case*⁵, held that the Portuguese did not have any right of passage for arms, ammunitions, armed police and armed forces across the Indian territory and that India did not act contrary to her international obligations in denying such passage to Portuguese personnel to suppress the popular revolt in the enclaved territories of Dadar, Daman and Nagar Haveli in 1954. But the Court at the same time also held that⁶ "Portugal had in 1954 a right of passage over intervening Indian territory in respect of private persons, civil officials and goods in general to the extent

2. India in the Preliminary Objections contended that Portuguese Application of 22nd December, 1955 concerning right of passage over Indian territory was a violation of the reciprocal right conferred upon India, both by the terms of the 'Optional Clauses, and by the terms of India's Declaration, to exercise the power to make reservations contained in the third condition of the Portuguese Declaration of 19th December, 1955; that Portugal only shortly after becoming a Member of the United Nations filed her application of 22nd December, 1955 without attempting to pursue her diplomatic negotiations with India; that there was not any legal dispute between India and Portugal, etc. However, India's Declaration of 14th September, 1959 accepting the Court's compulsory jurisdiction did not affect India's dispute with Portugal on the question of Dadar, Daman and Nagar Haveli areas.

3. Article 94 of the Charter provides that each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. However, if a party fails to carry out the judgment of the Court, the aggrieved party may have a recourse to the Security Council which may take necessary measures to that effect. The non-fulfilment of this obligation may create only a situation and not a dispute and therefore outside the purview of Article 39 of the Charter of the United Nations which authorises the Security Council to determine and prevent threats to the peace, breaches of the peace and acts of aggression.

4. International Law and the United Nations 1960, op. cit. p. 16.

5. Case concerning Right of Passage over Indian territory (*Portugal v. India*) I.C.J.R. 1960, p. 39.

6. Ibid, p. 40.

necessary, as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India". This right which according to the Court is based on long practice and local customs had ceased to exist *ipso facto* with the emergence of sovereign independent India. Sagacity should have, compelled the Court to decline to exercise its jurisdiction in the present case on account of its political nature; but it surprisingly did not review the 'right of passage' on the existing actualities of the situation and allowed itself to tread on the dead notions of servitudes and shares of influence. There are contradictions in the judgment of the Court. While the Judges conceded that treaty of 1779 did not give sovereignty to Portuguese over the enclaves still in essence accepted the Portuguese sovereignty because, as they held, that, the British accepted it in fact and by implication which "*was subsequently and tacitly recognised by India*". Indeed it is clear from the majority and dissenting opinions that Judges were imperceptibly and psychologically swayed by non-legal and ideological considerations.

This criticism of the Court is not a new one. On controversial issues the Judges could not display complete detachment from their national interests and prejudices. A change in the character and outlook of the individuals for this august position is inevitable. It is only possible when the Charter of the United Nations and the Statute of the Court make it really like the highest judiciary of India and the United States within the municipal jurisprudence. The adjustment towards a better and just world order under the aegis of International Law and the Charter of the United Nations is surely an open invitation to a series of conflicts—ideological, political, economic, military, strategic, industrial, social and cultural—which may lead the world at this critical juncture of its history towards an unprecedented global horror and tragedy or towards a better and peaceful, prosperous and just world order. International society as it exists to-day is standing at the cross-road with cross-purposes and the possibilities of its drifting on either way are equal. Therefore, for the establishment of war-less world the tide of world events would press for maximum patience, greatest sacrifices of national interests from more than one hundred then existing States. As the States are divided vertically and horizontally it seems that instead of reason and mutual goodwill, the forces of the present day world would decisively impel the States towards a common happier world. In this larger context how far the human ingenuity succeeds in making international judiciary as a pivot of judicial control of administrative actions of international community the answer would be a difficult one.

GOVERNMENT'S LIABILITY FOR EMPLOYEES' TORTS

By

A. S. KUPPUSWAMI, *Advocate, Tirumelveli.*

A recent decision of the Supreme Court reported in *The State of Rajasthan v. Mst. Vidhyavati*¹, reveals the need for Parliamentary as well as State Legislation on the subject of the Government's liability for the torts of their employees as envisaged in Article 300 of the Constitution of India.

The issue of Government's liability arose in the above case in the following manner. The driver of a Government jeep car supplied to a Collector for his use took the car after repairs in a workshop along a public road to the Collector's place. Due to the driver's negligence, a pedestrian walking in an adjacent foot-path was knocked down by the car and he died as a result of the injury. The car-driver was an employee of the Government. The heirs of the deceased sued the Government, *viz.*, the State of Rajasthan, for damages. The Supreme Court

1. (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. (S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70.

held that the State of Rajasthan was liable. The Supreme Court has declared the law in the following terms:—

“ Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, viz., that the King was incapable of doing wrong and therefore of authorising and instigating one and that he could not be sued in his own Courts. In India, ever since the time of the East India Company, the Sovereign has been held liable to be sued in tort or in contract and the common law immunity never operated in India. Now that we have by our Constitution, established a Republican form of Government and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle or in public interest, that the State should not be held liable vicariously for the tortious act of its servant ”.

The Supreme Court has drawn pointed attention to the fact that the injuries were not caused, while the jeep car was being used in connection with the sovereign powers of the State. See page 71. This shows clearly that if a Government servant committed a tort while he was doing anything in connection with the exercise of sovereign powers of the State, the Government will not be liable. This is anomalous. There is no reason in principle why an innocent citizen who receives an injury due to a tort or civil wrong committed by a Government servant, should be deprived of his right to lawful compensation for the wrong, on the perfectly irrelevant ground that when he received the injury, the wrong doer was acting in connection with the exercise of sovereign powers of the State. This is an obvious anomaly in the existing law. It is apparently an offshoot of the feudalistic notions of justice in the language of the Supreme Court.

Article 300 of the Constitution expressly provides that the law as stated therein is “subject to any provision which may be made by Act of Parliament and the Legislature of a State enacted by virtue of powers conferred by the Constitution”. Thus, the entire subject of the Government’s liability for its employee’s torts has to be properly examined both by the Centre and the States and suitable legislation introduced.

The Crown Proceedings Act, 1947, of the British Parliament may be taken as a fair model for adoption after necessary examination. Section 2 of the Act states the main principle relating to the liability of Government for torts committed by its servants. It says that “subject to the provisions of this Act, the Crown shall be subject to all liabilities in tort to which if it were a private person, of full age and capacity, it would be subject in respect of torts committed by its servants or agent”. This broad and equitable principle may be adopted as the basis of the contemplated legislation under Article 300 of the Constitution.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, J.C. Shah and
Raghubar Dayal, JJ.
1st October, 1963.

The State of Uttar Pradesh v.
Kaushailiya.
Cr.As. Nos. 21-26 of 1962.

20—*Suppression of Immoral Traffic in Women and Girls Act, 1956 (CIV of 1956), section 20—"On receiving information"—International Convention for the Suppression of Immoral Traffic in Women and Girls signed at New York on 9th May, 1950—Definitions of 'girl' 'women' 'prostitute'—Articles 14 and 19 of the Constitution if infringed by section 20 of the Act.*

If the Legislature intended to confine the expression "information" only to that given by a Special Police Officer, it would have specifically stated so in the section. The omission is a clear indication that a particular source of information is not material for the application of the section. There is an essential distinction to the Magistrate: the former, when dealing with women, has potentialities for grave mischief and, therefore, entrusted only to specific officers, while mere giving of information would not have such consequences, particularly when, as we would indicate later, the information received by the Magistrate would only start the machinery of a judicial enquiry. We, therefore, hold, giving the natural meaning to the expression "on receiving information", that "information" may be from any source.

The object of the Act, as has already been noticed, is not only to suppress immoral traffic in women and girls, but also to improve public morals by removing prostitutes from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act. Section 20, in order to prevent moral decadence in a busy locality, seeks to restrict the movements of the second category of prostitutes and to deport such of them as the peculiar methods of their operation in an area may demand..... We, therefore, hold that section 20 of the Act does not infringe Article 14 of the Constitution.

Cases considered, A.I.R. 1963 Bom. 17, A.I.R. 1959 All. 57, (1950) S.C.J. 571 : (1950) S.C.R. 759, 763 and (1952) S.C.J. 253 : (1952) S.C.R. 597, 607 : (1952) 2 M.L.J. 135.

C.B. Agarwala, Senior Advocate, (C.P. Lal, Advocate, with him), for Appellant (in all the Appeals).

J.P. Goyal, Advocate, for Respondents, (in Cr.A. Nos. 21 to 24 and 26 of 1962).

G.R.

Appeals allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, J.C. Shah and
Raghubar Dayal, JJ.
3rd October, 1963.

Mohan Singh v.
Bhanwarlal.
C.A.No. 530 of 1963.

Representation of the People Act (XLIII of 1951), section 80 read with sections 100 and 101, section 82, section 123—Expression "Gratification."

The acceptance of offer which constitutes a motive or reward for withdrawing from the candidature must be acceptance of gratification; and if gratification does not include all offers and acceptances of mere promises, but requires, to constitute it an offer and acceptance relating to a thing of some value, though not necessarily estimable in terms of money, a mere offer to help in getting employment is not such offer of gratification, within the meaning of section 123 (1) (b) as to constitute it a corrupt practice. It was in the circumstances not necessary on the allegations made in para. 11 (b) of the petition to implead Himmat Singh as a respondent to

the petition. We therefore agree with the High Court, though for different reasons, that the petition filed by Bhanwarlal was not defective.

The test in cases under section 123 (4) is whether the imputation besides being false in fact, is published with the object of lowering the candidate in the estimation of the electorate and calculated to prejudice his prospects at the election. And in ascertaining whether the candidate is lowered in the estimation of the electorate, the imputation made must be viewed in the light of matters generally known to them.

In recording their conclusions the Tribunal and the High Court did not proceed on mere grounds of probability. The findings recorded by the Tribunal and the High Court are therefore concurrent findings of fact founded on appreciation of oral evidence and no ground is made out for departing from the settled practice of the Court against interference with those concurrent findings of fact.

U.M. Trivedi, Senior Advocate, (*Malik Arjun Das, Shanti Swarup Khanduja and Ganpat Rai*, Advocates, with him), for Appellant.

G.S. Pathak, Senior Advocate, (*U. N. Dhachawat*, Advocate and *Rameshwar Nath and S.N. Andley*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, J.C. Shah and
Raghubar Dayal, JJ.*
31d October, 1963.

H. H. the Maharana, Sahib
Shri Bhagwat Singh Bahadur of
Udaipur v.
The State of Rajasthan.
C.A.No. 528 of 1963.

Industrial Disputes Act (XIV of 1947), section 10—Sections 86 and 87-B, Civil Procedure Code (V of 1908)—Articles 362, 366 (22) of the Constitution—United State of Rajasthan Covenant.

The Industrial Disputes Act, 1947, as originally enacted applied to British India. But by the amendment made by the Industrial Disputes (Appellate Tribunal) Act, XLVIII of 1950, section 34 and the schedule thereto, the Act was extended to the whole of India except the State of Jammu and Kashmir, and since then by the enactment of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, XXXVI of 1956, the Act extends to the whole of India. The Industrial Disputes Act, 1947, therefore, applied at the material time to the territory of Rajasthan. The appellant is a citizen of India, the Act extends to the territory of Rajasthan and *prima facie* he is governed by the provisions of the Act.

But whether the bar to the jurisdiction of a Court arising out of Article 363 can be effectively pleaded has, it must be observed, not been investigated before the High Court. It was also not raised before us : it has fallen to be mentioned by us because it arises out of the plea raised for the first time before this Court in which reliance is placed on Article 362 by the appellant. We therefore decline to express any opinion on the questions whether by Article 362 the appellant is privileged against reference under the Industrial Disputes Act and also whether the Courts have jurisdiction to adjudicate upon the plea set up by the appellant. *Sudhansu Sekar Singh Deo v. State of Orissa*, (1961) I.S.C.R. 779, 786, held not applicable and distinguished.

G.S. Pathak, Senior Advocate, (*K. Jinder and B. Dutta*, Advocates and *J. B. Dadachanji, O.C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

G.C. Kashwal, Advocate-General, for the State of Rajasthan, (*S.K. Kapur and B.R.G.K. Achar*, Advocates, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, J.C. Shah and
Raghubar Dayal, JJ.
4th October, 1963.

Corporation of Calcutta v.
Calcutta Tramways Co., Ltd.
Gr. A. 117 of 1961.

Calcutta Municipal Act (XXXIII of 1951), sections 437, 537—Madras City Municipal Act (IV of 1919)—Delhi Municipal Corporation Act (LXVI of 1957)—Article 19 of the Constitution—Plea of mala fide.

It has been urged that the Corporation which is an elected body would exercise the power conferred on it under section 437 (1) (b) reasonably and therefore the provision must be considered to be a reasonable provision. This in our opinion is no answer to the question whether the provision is reasonable or not. It is of course true that *mala fide* exercise of the power conferred on the Corporation would be struck down on that ground alone; but it is not easy to prove *mala fide*, and in many cases it may be that the Corporation may act reasonably under the provision but it may equally be that knowing that its opinion is conclusive and non-justiciable it may not so act, even though there may be no *mala fides*. The vice in the provisions is that it makes the opinion of the Corporation, howsoever capricious or arbitrary it may be or howsoever unreasonable on the face of it it may be, conclusive and non-justiciable. The conferment of such a power on a municipal body which has the effect of imposing restrictions on carrying on trade, etc., cannot in our opinion be said to be a reasonable restriction within the meaning of Article 19 (6). Such a provision puts carrying on trade by those residing within the limits of the municipal corporation entirely at its mercy, if it chooses to exercise the power capriciously, arbitrarily or unreasonably, though not *mala fide*. We therefore agree with the High Court that the conferment of such a power on the Corporation as it stands in the parenthetical clause in section 437 (1) (b) must be held to be an unreasonable restriction on the right to carry on trade, etc.

We are of opinion that the view taken by the High Court is not correct. We have already pointed out that such a provision did not exist in the earlier Act relating to this very Corporation and it is no one's case that without such provision the earlier provision did not work. The first question therefore is whether it was the intention of the Legislature when it passed section 437 (1) (b) that if it knew that the parenthetical clause was invalid it would not have enacted the rest of section 437 (1) (b). The answer to this question in our opinion can only be one. In view of the corresponding provision in the Calcutta Municipal Act, 1923 we cannot accept that the Legislature would not have provided for the licensing of premises which in the opinion of the Corporation were used for purposes which were dangerous to life, health or property or were likely to create a nuisance, unless that opinion was to be conclusive and non-justiciable.

We are therefore of opinion that the parenthetical clause consisting of the words "which opinion shall be conclusive and shall not be challenged in any Court" is severable from the rest of section 437 (1) (b) and therefore only these words of this section can be struck down and not the whole of the section. It may be added that the respondent does not rely on any of the remaining principles set out in *R.M.D. Chamarbaugwalla v. The Union of India*, (1957) S.C.J. 593 : (1957) 2 An.W.R. (S.C.) 76 : (1957) M.L.J. (Cr.) 547 : (1957) 2 M.L.J. (S.C.) 76 : (1957) S.C.R. 930.

A.N. Sinha and P.K. Mukherjee, Advocates, for Appellant.

M.G. Setalvad, Senior Advocate, (Sukumar Ghose and B.N. Ghosh, Advocates, with him), for Respondent.

G.R.

Case remanded.

[SUPREME COURT.]

*B.P. Sinha, C.J., M. Hidayatullah
and K.C. Das Gupta, JJ.
4th October, 1963.*

*Jamuna Singh v.
Bhadai Shah
Cr. A. No. 56 of 1960.*

Penal Code (XLV of 1860), sections 173, 190 and 202, 395 and 323 and Criminal Procedure Code (V of 1898), section 417 (3)—Amending Act XXVI of 1955 giving a right of appeal to the complainant against acquittal—Scope.

It is quite clear that the High Court examined the matter fully and carefully and on a detailed consideration of the evidence came to the conclusion that that assessment of the evidence had resulted in a serious failure of justice. The principle laid down by this Court in a series of cases as regards interference with orders of acquittal have been correctly followed by the High Court. There is nothing therefore, that would justify us in reassessing the evidence for ourselves. As relevant parts of the evidence were however placed before us, we think it proper to state that on a consideration of such evidence we are satisfied that the decision of the High Court is correct.

D.P. Singh, Advocate of M/s. Ramamurthi & Co., Advocates, for Appellants.

K.K. Sinha, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*B.P. Sinha, C.J., P.B. Gajendragadkar,
K.N. Wanchoo, M. Hidayatullah and
J.C. Shah, JJ.
7th October, 1963.*

*Pabitra Kumar Banerji v.
The State of West Bengal.
Petition No. 42 of 1960.*

Bar Council Act, 1926—Advocates Act (XXV of 1961)—Classification into (1) those who only plead, (2) those who both plead and act and (3) those who only act—Validity—Article 14 of the Constitution of India (1950).

It will be noticed that we have not dealt with this case in the legalistic way in which it was sought to be presented on either side. We have been chiefly guided by considerations 'public good', that is to say, that the Court should be assured of efficient and willing assistance from the Bar. It is only to be hoped that this forward step is a precursor of further improvements in the relations between the different sections of the Bar so that they may grow into a unified Bar with all the best traditions which it has inherited from the past and which it is its duty to uphold in the years to come to the lasting credit of the legal profession and to the lasting benefit of all concerned with law and litigation.

The Bar Library Club has already agreed before us to change its rules so that the Club conforms exactly to the first section; and admission to it will be governed by rules which are common to all lawyers who want only to plead; there is therefore no reason to interfere with accommodation provided by the Court to the three sections of the Bar. We have also no doubt that the Chief Justice will see that the undertaking given by the Bar Library Club will be carried out. We may add that in case the undertaking is not carried out, the Chief Justice will see that necessary and appropriate rules are framed which will carry out the purpose for which the accommodation is placed at the disposal of the three sections of the Bar and the same are implemented so that there is no denial of equality before the law and accommodation is used for the three sections we have indicated above.

G.S. Pathak, Senior Advocate, (A.P. Chatterji, Mrs. E. Udayarathnam, Dugabhai Deshmukh, B. Dutta and S.S. Shukla, Advocates, with him), for Petitioners and the Intervener.

Ranadeb Chaudhuri, Senior Advocate, (S.P. Varma and P. K. Bose, Advocates, with him), for Respondents Nos. 1 and 2.

C. K. Daphtary, Solicitor-General of India, (S. N. Ghorai, Advocate and S.N. Andley and Rameshwar Nath, Advocates of M/s. Rajinder Narain & Co., with him), for Respondent No. 3.

N.C. Chatterjee, Senior Advocate, (S.N. Ghorai, Advocate and S.N. Andley and Rameshwar Nath, Advocates of M/s. Rajinder Narain & Co., with him), for Respondent No. 4.

G.R.

Petition dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, J.G. Shah and
Raghubar Dayal, JJ.
9th October, 1963.

Syed Yakoob v.
K.S. Radhakrishnan.
C.A.No. 593 of 1963.

Motor Vehicles Act (IV of 1939)—Writ of certiorari—High Courts Jurisdiction—Error of law on the face of the record—Article 136 of the Constitution.

By Majority :—Relying upon its earlier decisions (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) I.S.C.R. 1104 ; (1958) S.C.J. 798 : (1958) S.C.R. 1240, and A.I.R. 1960 S.C. 1168, the Court held : the question about the limits of the jurisdiction of High Courts in issuing a writ of *certiorari* under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of *certiorari* can be issued for correcting errors of jurisdiction committed by inferior Courts or Tribunals : these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of *certiorari* is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of *certiorari* can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by writ of *certiorari*. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of *certiorari* on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of *certiorari* can be legitimately exercised (vide *Hari Vishnu Kamath v. Syed Ahmad Ishaque and others*, (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104, *Nagendra Nath Bora and another v. The Commissioner of Hills Division and Appeals, Assam and others*, (1958) S.C.J. 798 : (1958) S.C.R. 1240, and *Kaushalya Devi and others v. Bachittar Singh and others*, A.I.R. 1960 S.C. 1168).

It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means,

It may be conceded that in a proper case this Court may refuse to exercise its jurisdiction under Article 136 where the interests of justice patently indicate the desirability of adopting such a course ; but we do not see how a plea of such kind can be entertained where it is clearly shown that the impugned orders passed by the High Court are without jurisdiction.

M.C. Setalvad, Senior Advocate, (*R. Gopala Krishnan*, Advocate, with him), for Appellant.

G.S. Pathak, Senior Advocate, (*O.C. Mathur*, *J.B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him); for Respondent No. 1.

A. Ranganadham Chetty, Senior Advocate, (*A.V. Rangam*, Advocate, with him), for Respondents Nos. 2 and 3.

G.R.

Appeal allowed.

[SUPREME COURT.]

B.P. Sinha, C.J., *M. Hidayatullah* and
K.C. Das Gupta, JJ.
9th October, 1963.

Chandi Kumar Das Karmarkar v.
Abanidhar Roy.
Cr.A.No. 214 of 1960.

Penal Code (XLV of 1860), section 379—Scope—Gist of offence under—Animus furandi.

The offence of theft consists in the dishonest taking of any moveable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as *animus furandi* and without it the offence of theft is not complete. Fish in their free state are regarded as *ferae naturae* but they are said to be in the possession of a person who has possession of any expanse of water such as a tank, where they live but from where they cannot escape. Fishes are also regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot known as a fishery but only within that spot. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any *bona fide* claim of right.

In our opinion there was an absence of the *animus furandi* and the circumstances bring this case within the rule that where the taking of moveable property is in the assertion of a *bona fide* claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft. In this view of the matter we are of opinion that the acquittal of the appellants ought not to have been set aside. We accordingly allow the appeal and setting aside the conviction of the appellants' order their acquittal. The fines if recovered shall be refunded to them.

Nuruddin Ahmed and *B.P. Maheshwari*, Advocates, for Appellants.

S. C. Majumdar, Advocate, for Respondent.

P.K. Chatterjee, Advocate, for *P.K. Bose*, (Upon notice being issued) Advocate, for State of West Bengal.

G.R.

Appeal allowed.

[SUPREME COURT.]

M. Hidayatullah and
K.C. Das Gupta, JJ.
9th, October, 1963.

Mohammad Ikram Hussain v.
The State of Uttar Pradesh.
Cr. As. Nos. 227-228 of 1960.

Criminal Procedure Code (V of 1898), section 491—Habeas Corpus—Contempt of Court's order.

In our opinion the writ *nisi* in this case for the production of Kaniz Fatima should have been preceded by some more enquiry. It is wrong to think that in *habeas corpus* proceedings the Court is prohibited from ordering an inquiry into a fact. All procedure is always open to a Court which is not expressly prohibited

and no rule of the Court has laid down that evidence shall not be received, if the Court requires it. No such absolute rule was brought to our notice. It may be that further evidence would have borne out what Mahesh stated and then the order could always be passed for the production of Kaniz Fatima; but if the evidence did not bear out what Mahesh alleged then the order which the appellant disobeyed and for which he has to suffer imprisonment would never have been passed. The learned Judges failed to notice that Mahesh's affidavit was that she was pregnant for 6 months and not as they state that she ran away early in June 1960 because she became pregnant. It would be difficult to hide such an advanced pregnancy till 20th June, 1960 when she left the house.

The High Court relied upon certain cases and Mr. N. C. Chatterjee attempted to distinguish them. The cases referred to by Mr. Chatterjee were the *The Queen v. Barnardo*, 23 Q.B.D. 305, *The Queen v. Barnardo*, 24 Q.B.D. 283 and *Thomas John Barnardo v. Mary Ford*, 1892 A.C. 326. We do not consider it necessary to refer to them because the principles on which a person is released from private detention and custody are well settled and also well known. The High Court can always order the production of the body of a person illegally detained and can punish disobedience of its order by attachment and commitment. There is neither doubt nor complexity in this proposition, once it is held that the disobedience was wilful.

We pass no order in the other appeal but we hope that if Mahesh renews the petition, the High Court will put him to strict proof of his allegations regarding the age, the conversion of Kaniz Fatima and his marriage with her and his lack of interest in her welfare for over three years before ordering a second time that Kaniz Fatima be brought into Court.

N.C. Chatterjee, Senior Advocate, (*D.P. Singh* and *M.I. Khawaja*, Advocates, with him), for Appellant (in both the Appeals).

G.P. Lal, Advocate, for Respondent No. 1.

G.R.

Order accordingly:

[SUPREME COURT.]

P.B. Gajendragadkar, *K. Subba Rao*,
K.N. Wanchoo, *J.C. Shah* and
Raghubar Dayal, JJ.
11th October, 1963.

Makhan Singh Tarsikka v.
The State of Punjab.
Cr.A.No. 80 of 1963.

Defence of India Rules, Rule 30 (1) (b)—Sections 307, 324, 364 and 367, *Indian Penal Code (XLV of 1860)*—Nature and Scope of the orders.

It is thus clear that the nature and the scope of the orders which can be validly passed under rule 30 (1) is very much wider than the order of detention which alone can be made under section 3 (1) of the Act. But the question which we have to consider is : does this fact make any difference to the interpretation of the operative provisions of Rule 30 (1) in relation to detention? In our opinion the answer to this question must be in the negative. Rule 30 (1) (b), like section 3 (1) (a), clearly postulates that an order can be made under it only where it is shown that but for the imposition of the said detention, the person concerned would be able to carry out a prejudicial activity of the character specified in Rule 30 (1). In other words, one of the conditions precedent to the service of the order permitted under Rule 30 (1) (b) is that if the said order is not served on the person, he would be free and able to carry out his prejudicial activity in question. The fact that other kinds of orders can be passed against a person under Rule 30 (1) does not alter the essential condition of a valid service of the order contemplated by Rule 30 (1) (b) that if the said order is not served, the prejudicial activity may follow. Therefore, we are satisfied that on a plain construction of Rule 30 (1) (b) it must be held that the order permitted by it can be served on a person who would be free otherwise to carry out his prejudicial activity. Such a freedom cannot be predicted of the appellant in the present case because he was in jail at the relevant time. Therefore, we do not think that the distinction which the Dy. Advocate-General seeks to make

between the provisions of Rule 33 (1) (b) and section 3 (1) (a) makes any difference to the construction of the Rule. The service of a detention order on a person who is already in jail custody virtually seeks to effectuate what may be called "a double detention" and such double detention is not intended either by section 3 (1) (a) or by Rule 30 (1) (b); it is plainly unnecessary and outside the purview of both the provisions.

If the appropriate authority wants to detain a person under Rule 30 (1) (b), it must be shown that when the order of detention is served on him, he was free to carry out his prejudicial activities and his prejudicial activities could be prevented only by his detention. Therefore we must hold that the service of the order of detention on the appellant whilst he was in jail custody is invalid.

R.K. Garg, S.C. Agarwal, M.K. Ramamurthi and D. P. Singh, Advocates of M/s. Ramamurthi & Co., for Appellant.

L.D. Kaushal, Senior Deputy Advocate-General, for the State of Punjab, (B.R. G.K. Achar, Advocate, with him), for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

*P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, N. Rajagopala Ayyangar
and J.R. Mudholkar, JJ.
21st October, 1963.*

*Raichand Amulakh Shah v.
The Union of India.
C.As. Nos. 149-154 of 1959.*

Railways Act (IX of 1890), as amended sections 3 (14), 26, 32, 34, 41, 45, 46-A to 46-C—Refund—Maintainability of suits.

Let us now see whether any remedy is provided by the Act for an aggrieved party to ask for a refund of the charges collected on the ground mentioned in the plaint. The Tribunal constituted under section 34 of the Act has jurisdiction to decide whether the charges levied by the railway administration other than the standardised terminal charges were unreasonable. The Act does not provide for any remedy for any aggrieved party to approach the Tribunal for a refund of the amount collected by the railway administration by way of wharfage or demurrage on the ground that the rules empowering the said administration to do so are *ultra vires* or that the amounts so collected are in excess of wharfage or demurrage leviable under the rules. If the impugned charges are standardised terminal charges, the dispute in regard thereto falls outside section 41 of the Act. If they are charges other than the standardised terminal charges, the jurisdiction of the Tribunal is confined only to the question of its reasonableness. It has no jurisdiction to decide whether the rules empowering the railway administration to levy a particular charge are *ultra vires* or whether the railway administration collected amounts in excess of the charges which it can legally levy under a rule. If so, it is clear that no provision has been made under the Act giving a remedy to an aggrieved party to ask for a refund of amounts, such as those alleged to have been collected from the appellants. Section 26 therefore, cannot be a bar against the maintainability of the suits filed by the appellants.

S.P. Sinha, Senior Advocate, (Shahzadi Mohiuddin and M.I. Khowaja, Advocates, with him), for the Appellants (in all the appeals).

N.S. Bindra, Senior Advocate, (R.N. Sachthey, Advocate, with him), for Respondent (in all the appeals).

G.R.

Appeals allowed

[SUPREME COURT.]

*P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, M. Hidayatullah,
K.C. Das Gupta, J.C. Shah and
N. Rajagopala Ayyangar, JJ.*
5th December, 1963.

Moti Ram Dolia v.
General Manager, North
East Frontier Railway, etc.
C. As. Nos. 711 to 714 of 1962-
and 837 to 839 of 1963-

*Railway Establishment Code, Volume I, rule 148 (3) and rule 149 (3) superseding it—
If void as infringing Articles 14 and 311 (2) of the Constitution of India.*

By Majority (*Gajendragadkar, Wanchoo, Hidayatullah and Rajagopala Ayyangar, JJ.*)
The power of the President or the Governor to terminate the services of any civil servant to whose case Article 310 (1) applies at his pleasure is subject to the provisions of Article 311 of the Constitution. The field that is covered by Article 311 on a fair and reasonable construction of the relevant words used in that Article would be excluded from the operation of the absolute doctrine of pleasure. The pleasure of the President will still be there, but it has to be exercised in accordance with the requirements of Article 311.

The word "removal" like the two other words "dismissal" and "reduction in rank" used in Article 311 (2) refers to cases of major penalties which were specified in the relevant service rules.

The true position is that Articles 310 and 311 must no doubt be read together, but once the true scope and effect of Article 311 is determined, the scope and effect of Article 311 (1) must be limited in the sense that in regard to cases falling under Article 311 (2) the pleasure mentioned in Article 310 (1) must be ascertained in accordance with the requirements of Article 311.

Termination of the services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement, must *per se* amount to a removal, and so, if by rule 148 (3) or rule 149 (3) (which has superseded it) of the Railway Establishment Code (Volume I) a termination of services is brought about the rule clearly contravenes Article 311 (2) of the Constitution and must be held to be invalid. Neither of the two rules contemplates an enquiry and in none of the instant cases had the procedure prescribed by Article 311 (2) been followed. The fact that some kind of proportionate pension is awardable (rule 321) to railway servants whose services are terminated under rule 149 (3) would not assimilate the cases dealt with under the said rule to cases of compulsory retirement. The right to terminate services conferred by rule 149 (3) has to be struck down as inconsistent with Article 311(2) in spite of the fact that a similar right is given to the servant concerned.

The argument that the rule was part of the contract of service which the servant entered into with full knowledge of the rule and therefore cannot complain about it, can have no validity in dealing with the question about the constitutionality of the impugned Rule.

Biswanath Singh v. District Traffic Superintendent, N. E. Railway, A.I.R. 1958 Pat. 221, The Union of India v. Askaran, A.I.R. 1957 Raj. 836, Hardwar Lal v. General Manager, N.E. Railway, Gorakhpur, A.I.R. 1959 All. 439, Kishan Prasad v. The Union of India, A.I.R. 1960 Cal. 264 and D. S. Srinath v. General Manager, Southern Railway, A.I.R. 1962 Mad. 379 overruled.

Shyam Lal v. State of U. P. and the Union of India, (1954) S.C.J. 493 : (1954) 1 M.L.J. 730 : (1955) 1 Sup.C.R. 26 explained and distinguished.

No other branch of public service in India contains a rule similar to the impugned rule 148 (3) or 149 (3) of the 'Railway Establishment' Code for its civil servants. Employment under the Railway alone cannot be said to constitute a class by itself for the purpose of framing the impugned rule. After the Railways were taken over by the State the validity of the rule is exposed to the challenge under Article 14 of the Constitution as discriminatory.

Per Subba Rao, J.—A title to an office must be distinguished from the mode of its termination. If a person has title to an office he will continue to have it till he is dismissed or removed therefrom. Terms of Statutory Rules may provide for conferment of a title to an office and also for the mode of terminating it. If under such Rules a person acquires title to an office, whatever mode of termination is prescribed,

whatever phraseology is used to describe it, the termination is neither more nor less than a dismissal or removal from service and that situation inevitably attracts the provisions of Article 311 of the Constitution. The argument that the mode of termination prescribed derogates from the title that otherwise would have been conferred on the employee mixes up two clear concepts of conferment of title and the mode of its deprivation. Article 311 is a constitutional protection given to Government servants, who have title to office, against arbitrary and summary dismissal. It follows that the Government cannot by rule evade the provisions of the said Article. The parties cannot also contract themselves out of the constitutional provision.

Rules 148 (3) and 149 (3) of the Railway Establishment Code conferring power on the appointing authority to remove a permanent servant on notice would infringe the constitutional protection given to a Government servant under Article 311 of the Constitution. A permanent post and such rules cannot stand together: the latter must inevitably yield to the former.

Rules 148 (3) and 149 (3) of the Railway Establishment Code being violative of the provisions of Articles 14 and 311 of the Constitution are void and unenforceable.

Per Das Gupta, J.—When the service is terminated under rule 148 (3) the termination is not “removal” or “dismissal” and it cannot be said that the rule contravenes Article 311. But the rule enables the authority concerned to discriminate between two railway servants to both of whom rule 148 (3) as well as rule 149 (3) equally applied by taking action in one case and not taking action in the other. In the absence of any guiding principle in the exercise of the discretion by the authority the rule has therefore to be struck down as contravening the requirements of Article 14 of the Constitution and consequently void.

Per Shah, J.—If determination of service under rule 148 (3) of the Railway Establishment Code does not amount to dismissal or removal as a disciplinary measure, there is nothing in the Constitution which prohibits such determination provided it is consistent with Article 309 of the Constitution. A determination of service founded on a right flowing from contract or the service rules, is not punishment and carries with it no evil consequences. It does not deprive the public servant of his right to the post, it does not forfeit benefits already acquired and casts no stigma upon him.

A railway employee who has accepted employment on the conditions contained in the Rules cannot after having obtained employment, claim that the conditions which were offered to him and which he accepted, are not binding upon him.

The impugned rules apply to all railway servants holding posts pensionable and non-pensionable. The special conditions in which the Railways have to operate and the interests of Nation which they serve justify the classification. If for the purpose of ensuring the interests and safety of the public and the State, the President has reserved to the Railway Administration power to terminate employment under the Railways, it cannot be assumed that such vesting of authority singles out the railway servants for a special or discriminatory treatment so as to expose the rule which authorises termination of employment to the liability to be struck off as infringing Article 14. Rule 148 (3) cannot be regarded as infringing either Article 311 (2) or Article 14 of the Constitution.

B. C. Ghosh senior Advocate (*P. K. Chatterjee* Advocate with him for Appellants in C.A.Nos. 711 to 713 of 1962 and Respondents in C. A. No. 837 to 839 of 1963.

I. M. Lall and U. D. Mahajan Advocates for Appellant in C.A.No. 714 of 1962.

S.V. Gupta (Additional Solicitor-General for India) (*Naunit Lal and R. H. Dhebar*, Advocates with him), for Respondents in C.A.Nos. 711 to 714 of 1962.

G. K. Daphtary (Attorney-General of India (*R. Ganapathy Iyer and R. H. Dhebar*, Advocates with him), for Appellants, in C.A.Nos. 837 to 839 of 1963.

R. K. Garg and P. K. Chatterjee, Advocates for Intervenors in C.A. Nos. 837 to 839 of 1963.

R. K. Garg, M. K. Ramamurti, S. C. Agarwal and D. P. Singh, Advocates of *M. K. Ramamurti & Co.* for Intervenors in C.A.No. 711 to 714.

K.S.

C. As. Nos. 711 to 714 allowed.
C. A. Nos. 837 to 839 dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, N. Rajagopala
Ayyangar and J.R. Mudholkar, JJ.
19th September, 1963.

State of Punjab v.
Jagdeep Singh.
C.As. Nos. 290 to 293 of 1962;

Constitution of India (1950), Article 311—Section 111 of the States Reorganisation Act, 1956.

*By Majority :—*Applying the decision in *Parashotam Lal Dingra v. Union of India* (1958) S.C.J. 217 : (1958) S.C.R. 828, the Court held therefore, even though upon their allocation to the State of Punjab as from 1st November, 1956, they were shown as confirmed Tahsildars, they could not in law be regarded as holding that status. Legally their status was only that of Officiating Tahsildars. The notification in question in effect recognises only this as their status and cannot be said to have the effect of reducing them in rank by reason merely of correcting a earlier error. Article 311 (2) does not, therefore, come into the picture at all.

S.M. Sikri, Advocate-General for the State of Punjab (*Gopal Singh and R.N. Sachthey*, Advocates, with him, for Appellant (In all the appeals.)

S.P. Sinha, Senior Advocate, (*Sukhdev Singh Sodhi, S.K. Mehta, Shahzadi Mohiuddin and K.L. Mehta*, Advocates, with him), for Respondent (In all the appeals).

G.R.

Appeals allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo, J.C. Shah and
Raghubar Dayal, JJ.
20th September, 1963.

Afzal Ullah v.
The State of U.P.
Cr. A. No. 1 of 1962.

United Provinces Municipalities Act (XI of 1916), section 299 (1)—Bye-laws under the Act—Power of the Board to make Bye-laws—Plea of mala fide.

Applying its earlier decision *P. Balakottaiiah v. Union of India and others*, A.I.R. 1958 S.C. 232 at 236, the Court held, it is true that the preamble to the bye-laws refers to clauses A (a), (b) and (c) and J (d) of section 298 and these clauses undoubtedly are inapplicable ; but once it is shown that the impugned bye-laws are within the competence of respondent No. 2, the fact that the preamble to the bye-laws mentions clauses which are not relevant, would not affect the validity of the bye-laws. The validity of the bye-laws must be tested by reference to the question as to whether the Board had the power to make those bye-laws. If the power is otherwise established, the fact that the source of the power has been incorrectly or inaccurately indicated in the preamble to the bye-laws, would not make the bye-laws invalid.

No doubt Mr. Misra referred to the fact that Aftab Ahmad has admitted that there is no other grain market in Sakrawal except the one run by the appellant, but that, in our opinion can hardly afford a basis on which the plea of *mala fides* could be judged, Sakrawal appears to be a locality in the town of Tanda, and so, a statement even if it is taken at its face value, cannot possibly justify the assumption that there is only one grain market in the whole of the town of Tanda. Besides, for proving *mala fides* the appellant ought to have made appropriate allegations at the stage of trial and led evidence to prove them. Therefore, the plea of *mala fides* cannot be permitted to be raised.

As the High Court has pointed out, these are pleas of fact and should have been taken at the trial. In our opinion, therefore, the High Court was fully justi-

fied in not allowing the appellant to take these pleas for the first time at the appellate stage.

B.C. Misra, Advocate, for Appellant.

C.B. Agarwala, Senior Advocate, (G.P. Lal, Advocate, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

B.P. Sinha, C.J., J.G. Shah and
N. Rajagopala Ayyangar, JJ.
20th September, 1963.

Kaushalya Rani v.
Gopal Singh.
Cr. A. No. 126 of 1962.

Limitation Act (IX of 1908), section 5, Article 157—*Delhi Special Police Establishment Act, 1946*—Section 417, Criminal Procedure Code (V of 1898).

Reviewing the case law decided by the various High Courts the Court held "in our opinion, the view taken by the Full Bench of the Bombay High Court in the case of *Anjanabai v. Yeshwantrao Daulatrao Dudhe*, I.L.R. (1961) Bom. 135, is the correct one. In that case it was held that the provisions of section 417 (4) of the Criminal Procedure Code were a 'special law' within the meaning of section 29 (2) of the Limitation Act. In that case, the High Court has dealt with the decisions of the different High Courts on the question and with the reasoning for those decisions. As we agree with the conclusions of the High Court of Bombay, we do not think it necessary to repeat the observations made therein, bearing on the reasons given by the High Courts of Allahabad, Andhra Pradesh and Madras for coming to contrary conclusions.

Cases considered I.L.R. 30 Pat. 126 ; I.L.R. (1952) Bom. 1083, A.I.R. 1958 All. 691 ; I.L.R. (1960) All. 761 ; (1957) 1 M.L.J. 150 : A.I.R. 1958 Mad. 416. (1956) An. W.R. 821 : A.I.R. 1957 And. Pra. 406 : (1958) 1 An. W.R. 75 : A.I.R. 1958 An. Pra. 230 and I.L.R. (1961) Bom. 135.

Dr. Vidya Dhar Maharajan, Advocate, for Appellant.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, N. Rajagopala Ayyangar
and J. R. Mudholkar, JJ.
23rd October, 1963.

Champaklal Chimanlal Shah v.
The Union of India.
C.A. No. 472 of 1962.

Constitution of India (1950), Article 311 (2)—*Right of preliminary enquiry*—*Central Civil Services (Temporary Service) Rules, 1949*—*Quasi-permanent service*.

We are of opinion that there is no force in this argument, and as a matter of fact the context of rule 3 itself requires that that rule must be read in harmony with the definition of "quasi-permanent service" in rule 2 (b), for it could not possibly be the intention of the rule-making authority to create disharmony between the definition in rule 2 (b) and the provision in rule 3. The contention on behalf of the appellants that the two sub-clauses are independent and have to be read disjunctively must be rejected and it must be held that both the conditions in rule 3 must be satisfied before a Government servant can be deemed to be in quasi-permanent service.

There must therefore be no confusion between the two enquiries and it is only when the Government proceeds to hold a departmental enquiry for the purpose of inflicting on the Government servant one of the three major punishments indicated in Article 311 that the Government servant is entitled to the protection of that Article. That is why this Court emphasised in *Parshottam Lal Dhingra v. Union of India*, (1958) S.C.J. 217: (1958) S.C.R. 828, and in *Shamlal v. The State of Uttar Pradesh*, (1954) S.C.J. 493 : (1954) 1 M.L.J. 730: (1955) 1 S.C.R. 26, that the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule is irrelevant.

We are, therefore, of opinion that on the facts of this case Article 311 (2) has no application and the appellant was not entitled to the protection of that Article before his services were terminated under rule 5, for the termination of service here does not amount to infliction of the penalty of dismissal or removal.

R. K. Garg, S. C. Agarwala, D. P. Singh and M. K. Ramamurthi, Advocates of *M/s. Ramamurthi & Co.*, for Appellant.

S. V. Gupte, Additional Solicitor-General of India, (*V.D. Mahajan* and *R. N. Sachthey*, Advocates, with him), for Respondent.

G.R. .

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, J. C. Shah and
Raghubar Dayal, JJ.*
24th October, 1963.

*State of Maharashtra v.
Mishrilal Tarachand Lodha.*
C.A. No. 587 of 1962.

Bombay Court-fees Act, 1959, Article 1, Schedule I—Civil Procedure Code (V of 1908), sections 34 and 35—Interest pendente lite.

We therefore hold that the amount of *pendente lite* interest decreed is not to be included in the 'amount or value of the subject-matter in dispute in appeal' for the purposes of Article 1 of Schedule I of the Bombay Court-fees Act unless the appellant specifically challenges the correctness of the decree for the amount of interest *pendente lite* independently of the claim to set aside that decree. The appellant here has not specifically challenged the decree in that respect and therefore the High Court is right in holding the memorandum of appeal to be sufficiently stamped.

S. V. Gupte, Additional Solicitor-General of India (*R. H. Dhebar*, Advocate, with him), for Appellant.

S. G. Patwardhan, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, N. Rajagopala Ayyangar
and J. R. Mudholkar, JJ.*
24th October, 1963.

*Mangilal v.
Sugan Chand.*
C.A. No. 307 of 1963.

Transfer of Property Act (IV of 1882), sections 106 and 113—Madhya Pradesh Accommodation Control Act (XXIII of 1955).

Therefore, from the sole circumstance of acceptance of rent after 11th April, 1959 waiver cannot at all be inferred. We are, therefore, unable to accept the

argument of the learned Additional Solicitor-General that by cashing the cheque for Rs. 1,320 the plaintiffs waived all rights which accrued to them under the notice dated 11th April, 1959. As we have already said, no right under section 106 of the Transfer of Property Act had accrued to them because of the ineffectiveness of the notice in so far as the termination of tenancy was concerned and, therefore, no question of waiver with respect to that part of the notice arises. So far as the right accruing under section 4 (a) of the Accommodation Act is concerned, the defendant having been under liability to pay rent even after the giving of notice the acceptance of the rent by the plaintiffs would not by itself operate as waiver.

S.V. Gupte, Additional Solicitor-General of India (*O. C. Mathur*, *Ravinder Narain* and *J. B. Dadachanji*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

M. C. Setalvad, and *A.V. Viswanatha Sastri*, Senior Advocates, (*Rameshwar Nath* and *S. N. Andley*, Advocates of *M/s. Rajinder Narain & Co.*, with them), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, *K. Subba Rao*,
K. N. Wanchoo, *J. C. Shah* and
Raghubar Dayal, JJ.
5th November, 1963.

Jayantilal Amratlal Shodhan v.
F. N. Rana, Commissioner,
Baroda Division, Baroda.
C.A. No. 104 of 1963.

Land Acquisition Act (I of 1894), Article 258 (1) of the Constitution.

By majority.—The expression “acquisition, holding and disposal of property” would, in our judgment, include compulsory acquisition of property. That is a provision in the Constitution which within the meaning of the Proviso to Article 73 (1) expressly provides that the Parliament may acquire Property for the Union and consequently executive power of the Union in relation to compulsory acquisition of property is saved thereby power of the State to acquire land notwithstanding.

We see no distinction in principle between the notification which was issued by the Governor-General in *Edward Mills Company, Ltd., Beawar and others v. The State of Ajmer and another*, (1955) S.C.J. 42 : (1955) 1 M.L.J. (S.C.) 1 : (1955) 1 S.C.R. 735, and the notification with which we are dealing in this case. This is not to say that every order issued by an executive authority has the force of law. If the order is purely administrative, or is not issued in exercise of any statutory authority it may not have the force of law. But where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law.

G. S. Pathak, Senior Advocate, (*G. Dutta*, Advocate of *M/s. J. B. Dadachanji & Co.*), for Appellant.

C. K. Daphlary, Attorney-General for India, and *N. S. Bindra*, Senior Advocate, (*R. H. Dhebar*, Advocate, with them), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, N. Rajagopala Ayyangar
and J. R. Mudholkar, JJ.
7th November, 1963.

Sriman Srimath Addanki Tiruvenkata
Thata Desika Charyulu v.
State of A.P.
C.A. No. 375 of 1961.

Madras Estates (Reduction of Rent) Act (XXX of 1947) and Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—‘Estate’—Whether the Shrotriem is an ‘Estate’.

Apart however from the entry in column 3 read with columns 4 and 5 on which we have based our conclusion, we might point out that it is unthinkable that the grantor while granting the dry lands in the village, reserved for himself for his enjoyment or for a grant on future occasion the saline land wholly unfit for cultivation. We consider therefore that there is no substance in this last contention either.

It would therefore follow that the learned Judges of the High Court were right in holding that the notification by Government under the Rent Reduction Act was valid.

The Madras High Court had held in *Kama Umin Isa Ammal v. Ram Kadumban*, (1952) 2 M.L.J. 667 that such a decision of the Tribunal was null and void and therefore would not amount to a dismissal of the appeal by the Tribunal. So far as the second point was concerned, the learned Judges accepted as correct the view of the Madras High Court in the decision referred to and held that the order of the Tribunal dismissing the appellant's appeal was a nullity, but the learned Judges further held that this would not automatically nullify or vacate the determination and decision of the Settlement Officer under section 9 and his finding that the village in suit was an ‘inam estate’ but that it had the effect merely of leaving the appeal where it stood at the time it was purported to be dismissed by the two members who could not function as the Tribunal. In other words, the result of applying the rule enunciated by the Madras High Court was that there was a valid order of the Settlement Officer followed by an appeal which had been filed to the Tribunal but which had not yet been disposed of validly by the Tribunal. Thus the effect in law of the void order of the Tribunal was held to be that the appeal was still pending before the Tribunal. On this conclusion which is obviously correct the appellant could get no benefit, so far as the present suit was concerned, by the invalid dismissal of his appeal, for invoking the jurisdiction of the civil Court to determine the question whether the ‘inam village’ was an ‘inam estate’ though it would be competent to him to further prosecute the appeal, if he considered that that would serve his interests.

A. V. Viswanatha Sastri, Senior Advocate, (T. V. R. Tatachari, Advocate, with him), for Appellants.

G. K. Daphtary, Attorney-General for India (R. N. Sachthey, Advocate, for P. D. Menon, Advocate, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo
and K. G. Das Gupta, JJ.
7th November, 1963.

Workmen of Balmer Lawrie & Co.,
Ltd. v. Balmer Lawrie & Co., Ltd.
C.A. No. 820 of 1962.

Industrial Disputes Act (XIV of 1947)—Grades and scales of pay—Privilege leaves medical leave and retiring age.

Therefore, we are satisfied that having regard to the genesis of the five grades which prevailed in the respondent's concern and the manner in which these grades have functioned since 1949, it is not necessary to make any adjustments in the

grades by reducing their number. Accordingly, we think the Tribunal was right in refusing to accept the demand of the appellants to reduce the grades from five to two.

Now, it is obvious that these questions cannot be decided merely on the interested testimony either of the workmen, or of the employer and his witnesses. Unfortunately the Tribunal has lost sight of this important feature. Therefore, we are satisfied that the Tribunal was in error in refusing to consider the merits of the appellants' claim in regard to the modification and increase in the wage scales.

In regard to the appellants' grievance in respect of privilege leave and medical leave we see no substance.

The result is, the award rejecting the appellants' claim for modification and revision of wage scales is set aside and the matter is sent back to the Tribunal for disposal of this issue in accordance with law.

P. K. Sanyal, Senior Advocate (*P. K. Mukherjee*, Advocate, with him), for Appellants.

B. Sen, Senior Advocate (*S. Ghosh* and *B. N. Ghosh*, Advocates, with him), for Respondent No. 1.

G.R.

Appeal remanded.

[SUPREME COURT.]

K. Subba Rao and
J. R. Mudholkar, JJ.
27th January, 1964.

Balmukand v.
Kamlawati.
C.A. No. 7 of 1962.

Hindu Law—Karta of Joint family—Alienation—Whether a contract not beneficial to the family can be specifically enforced—Defensive purpose of the transaction.

We have no doubt that for a transaction to be regarded as one which is of benefit to the family it need not necessarily be only of a defensive character. But what transaction would be for the benefit of the family must necessarily depend upon the facts of each case. In the case before the Full Bench the two managers of the family found it difficult to manage the property at all with the result, apparently, that the family was incurring losses. To sell such property, and that too on advantageous terms, and to invest the sale proceeds in a profitable way could certainly be regarded as beneficial to the family. In the present case there is unfortunately nothing in the plaint to suggest that the karta Pindidas agreed to sell the property because he found it difficult to manage it or because he found that the family was incurring loss by retaining the property. Nor again is there anything to suggest that the idea was to invest the sale proceeds in some profitable manner. Indeed there are no allegations in the plaint to the effect that the sale was being contemplated by any considerations of prudence. All that is said is that the fraction of the family's share of the land owned by the family bore a very small proportion to the land which the plaintiff held at the date of the transaction. But that was indeed the case even before the purchase by the plaintiff of the 23/120th share from Devisahai. There is nothing to indicate that the position of the family *vis-a-vis* their share in the land had in any way been altered by reason of the circumstance that the remaining 17/20th interest in the land came to be owned by the plaintiff alone. Therefore, even upon the view taken in the Allahabad case the plaintiff cannot hope to succeed in this suit.

In these circumstances we must hold that the Courts below were right in dismissing the suit for specific performance. We may add that granting specific performance is always in the discretion of the Court and in our view in a case of this kind the Court would be exercising its discretion right by refusing specific performance.

No doubt Pindidas himself was bound by the contract which he has entered into and the plaintiff would have been entitled to the benefit of section 15 of the Specific Relief Act.

However, in the case before us there is no claim on behalf of the plaintiff that he is willing to pay the entire consideration for obtaining a decree against the interest of Pindidas alone in the property. In the result the appeal fails and is dismissed with costs.

Cases considered: I.L.R. 50. All. 969; (1856) 6 Moo. I.A. 393; I.L.R. 39 All. 437; 44 I.A. 147; I.L.R. 40 Mad. 709; 33 M.L.J. 1; I.L.R. 18 Pat. 306; (1948) 2 M.L.J. 47; A.I.R. 1949 Mad. 260; I.L.R. 1937 Mad. 906; (1937) 1 M.L.J. 422; A.I.R. 1937 Mad. 496.

N. C. Chatterjee, Senior Advocate, (*H.L. Mittal*, *S. S. Khanduja* and *Ganpat Rai*, with him), for Appellant.

Ram Lubhaya, Senior Advocate, (*S.K. Mehta* and *K. L. Mehta*, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, *K. N. Wanchoo*
and *K. C. Das Gupta*, JJ.
8th November, 1963.

The General Manager, Bhilai
Steel Project, Bhilai (M.P.) v. The Steel
Workers' Union, Bhopal.
C.As. Nos. 764-766 of 1963.

Industrial Employment Standing Orders Act 1946—C.P. and Berar Industrial Dispute and Settlement Act, 1947—Madhya Pradesh Industrial Workmen (Standing Orders) Act, 1959—Madhya Pradesh General Clauses Act—Madhya Pradesh Industrial Establishment Standing Orders Act (XXVI of 1961).

The effect of this was that Act XXVI of 1961 which became applicable to the Bhilai Steel Industry on 25th November, 1961 ceased to be applicable to the Bhilai Steel Industry on and from 29th April, 1962, when the President assented to the Amending Act. After this date the position again became the same as it was immediately before the Madhya Pradesh Act XXVI of 1961 came into force. That is, none of the Madhya Pradesh Acts about the standing orders was applicable to the Bhilai Steel Industry. So, the field was open for the Central Standing Orders Act to operate in respect of the Bhilai Steel Industry on and from the date when the Madhya Pradesh Act V of 1962 came into force.

We have therefore reached the conclusion that for sometime before 6th August, 1962, when the order of certification was passed, the Certifying Officer under the Central Government Standing Orders Act had become competent to certify the standing orders for the Bhilai Steel Industry.

We are of opinion that section 25 of the Madhya Pradesh General Clauses Act could not save the notification in question after the 1947 Act was repealed.

We therefore, set aside the order of the Industrial Court, Madhya Pradesh, but as that Court has not considered the other objections raised by the Unions in their appeals against the certification of the standing orders, we direct that the appeals be heard by the Industrial Court and disposed of in accordance with law after deciding the objections raised on merits.

S. V. Gupte, Additional Solicitor-General of India (*T. Kumar* and *R. H. Dhebar*, Advocates, with him), for Appellants (In all the Appeals).

I. N. Shroff, Advocate, for Respondent No. 3 (In C.A. No. 764 of 1963).

M. K. Ramamurthi, R. K. Garg, S. G. Agarwal and D.P. Singh, Advocates of M/s. Ramamurthi & Co., for Respondent No. 1 (In C.A. No. 765 of 1963).

G.R.

Appeals allowed.

[SUPREME COURT]

*P. B. Gajendragadkar,
K. N. Wanchoo
and K. C. Das Gupta, JJ.
14th November, 1963.*

*The Management of R. S. Madho Ram &
Sons (Agencies) Private, Ltd. v.
The Workmen as represented by Madho
Ram & Sons Employees' Union
C. A. No. 13 of 1963.*

Industrial Disputes Act (XIV of 1947), section 25-FF—Construction—Transfer of employees by the management.

Applying its earlier decision in *Anakapalle Co-operative Agricultural & Industrial Society v. Its Workmen and others*, (1962) 2 L.L.J. 621, the Court held the question as to whether a transfer has been effected so as to attract section 25-FF must ultimately depend upon the evaluation of all the relevant factors and it cannot be answered by treating any one of them as of over-riding or conclusive significance. Having regard to the facts which are relevant in the present case, we are satisfied that the appellant cannot claim to be a successor-in-interest of the firm so as to attract the provisions of section 25-FF of the Industrial Disputes Act. The transfer which has been effected by the firm in favour of the appellant does not in our opinion amount to the transfer of the ownership or management of an undertaking and so, the Tribunal was right in holding that section 25-FF and the Proviso to it did not apply to the present case.

M. C. Setalvad, Senior Advocate, (A. N. Goyal, Advocate, with him), for Appellants.

B. P. Maheswari and U. P. Singh, Advocates, for Respondent.

G.R.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. L. KAPUR, M. HIDAYATULLAH, J. C. SHAH AND J. R. MUDHOLKAR, JJ.

Bhaiyalal Shukla

.. Petitioner*

v.

The State of Madhya Pradesh and others

.. Respondents.

Central Provinces and Berar Sales Tax Act (XXI of 1947), as extended to Vindhya Pradesh by the Vindhya Pradesh Laws (Validating) Act (VI of 1952)—Part C States (Laws) Act, 1950—Works contract—Levy of tax on building materials—Validity of.

It was held by the Supreme Court in *Mithan Lal v. The State of Delhi*, (1959) S.C.J. 899, that, when Parliament enacted the Part C States (Laws) Act, 1950 and conferred power on the Central Government to extend any Act of a Part A State to any Part C State, that power of extension carried with it the plenary powers of Parliament and even though the law so extended might have been outside the competence of the State Legislature which enacted it, when extended under the authority of Parliament was a valid piece of law in a Part C State.

The Central Provinces and Berar Sales Tax Act, 1947, was validly extended to Vindhya Pradesh and was valid law as laid down in *Mithan Lal's case*, (1958) S.C.J. 899. It did not suffer from the defects pointed out in *Gannon Dunkerley's case* (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66, as it was not enacted or extended by the State Legislature.

The laws in different portions of the new State of Madhya Pradesh were enacted by different Legislatures and under section 119 of the States Reorganisation Act all laws in force are to continue until repealed or altered by the appropriate Legislature. The Sales Tax law in Vindhya Pradesh brought its validity under section 119 of the States Reorganisation Act, when it became a part of the State of Madhya Pradesh. Thereafter, the different laws in different parts of Madhya Pradesh can be sustained on the grounds that the differentiation arises from historical reasons, and a geographical classification based on historical reasons has been upheld by the Supreme Court in *M. K. Priithi Rajji v. The State of Rajasthan*, Civil Appeal No. 327 of 1956 decided on 2nd November, 1960 and again in *The State of Madhya Pradesh v. The Gwalior Sugar Co., Ltd. and others*, Civil Appeals Nos. 98 and 99 of 1957 decided on 3rd November, 1960.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri, Senior Advocate (R. K. Garg, D. P. Singh, S. C. Agarawal and M. K. Ramamurthi, Advocates of Messrs. Ramamurthi & Co., with him), for Petitioner (In all the Petitions).

B. Sen, Senior Advocate (B. K. B. Naidu and I. N. Shroff, Advocates, with him), for Respondents (In all the Petitions).

The Judgment of the Court was delivered by

Hidayatullah, J.—These six petitions under Article 32 of the Constitution have been filed by one Bhaiyalal Shukla, who was doing business of construction of buildings, roads, bridges etc., as contractor for the Public Works Department in Rewa Circle of the former Vindhya Pradesh State, now a part of the State of Madhya Pradesh. By these petitions, he challenges the levy of sales tax on building materials supplied by him in the construction of buildings, roads and bridges for the years, 1953-54 to 1958-59. For the first year in question, sales tax amounting to Rs. 1,840-5-0 has already been charged and paid. He seeks refund of this amount. For the remaining years except the last two, proceedings for assessment have been completed, but the amounts have not been paid. For the remaining two years, proceedings are pending for assessment of the tax. The respondents in the case are the State of Madhya Pradesh, which stands substituted for the State of Vindhya Pradesh and diverse officers connected with the assessment and levy of the tax. The contention of the petitioner is that the tax is not leviable in view of the decisions of this Court in two cases reported in *The State of Madras v. Gannon Dunkerley & Co. (Madras), Ltd.*¹, and *Pandit Banarsidas v. The State of Madhya Pradesh*². The respon-

*Petitions Nos. 110 to 115 of 1960.

21st December, 1961.

1. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 379.
66 : (1958) 2 An.W.R. (S.C.) 66 : (1959) S.C.R.

2. (1959) S.C.R. 427.

dents, however, claim that the tax is leviable, because the case falls within the decision of this Court reported in *Mithan Lal v. The State of Delhi*¹.

The United State of Vindhya Pradesh was formed by the Rulers of the States in Baghelkhand and Bundhelkhand, who agreed to unite into a common State, with the Maharaja of Rewa as the Rajpramukh. By the Covenant which was entered into by them at that time, it was provided that until a Constitution for the United State was formed, the legislative authority of the United State would vest in the Rajpramukh, and he was authorised to make and promulgate Ordinances for the peace and good government of the United State or any part thereof, and any Ordinance made by him had the force of an Act passed by the Legislature of the United State.

The Rajpramukh, in exercise of his powers drawn from the Covenant, promulgated the Vindhya Pradesh Sales Tax Ordinance II of 1949 for the levy of a tax on the sale of goods in Vindhya Pradesh. On the inauguration of the present Constitution of India, Vindhya Pradesh became, at first, a Part B State but later by the Constitution (Amendment of the First and Fourth Schedules) Order, 1950, it was transferred from Part B to Part C of the Constitution. The Ordinance of the Rajpramukh was applied to the whole of Vindhya Pradesh with effect from 1st April, 1950, by Notification No. 7 of 28th March, 1950 by the Chief Commissioner, Vindhya Pradesh, acting under section 1 (2) of the Ordinance.

Parliament then passed the Part C States (Laws) Act, 1950. Section 2 of that Act provided :

“Power to extend enactments to certain Part C States :—The Central Government may, by Notification in the Official Gazette, extend to any Part C State.....or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State.”

In exercise of the power conferred by the above section, the Central Government by Notification No. S.R.O. 6 dated 29th December, 1950, extended to the State of Vindhya Pradesh the Central Provinces and Berar Sales Tax Act, 1947 (XXI of 1947) as in force for the time being in the State of Madhya Pradesh, subject to certain modifications necessitated by the application of the Act to this new area. By the same Notification, a new section was added to the Madhya Pradesh Act, which read as follows :

“29. *Repeal and saving* : The Vindhya Pradesh Sales Tax Ordinance II of 1949 is hereby repealed, provided that.....,”

and here follow certain provisions saving the previous operation of the Ordinance.

On 20th March, 1951, the Central Government issued Notification No. 52 (Econ.) in exercise of the powers conferred by sub-section (3) of section 1 of the Central Provinces and Berar Sales Tax Act, 1947, as extended to the State of Vindhya Pradesh by Notification No. S.R.O. 6, ordering that from 1st April, 1951, the extended Act would come into force in the State of Vindhya Pradesh. On 23rd May, 1951, this Court rendered its judgment in *In re the Delhi Laws Act, 1912*.² It was held by majority by this Court that section 2 of the Part C States (Laws) Act, 1950, was *intra vires*, except for the concluding sentence, “provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State”, inasmuch as it was *ultra vires* the Indian Parliament.

Parliament then passed the Government of Part C States Act, 1951 (XLIX of 1951) on 6th September, 1951. Under that Act, Legislative Assemblies were set up, and under section 21, they were invested, subject to certain limitations, with powers of legislation with respect to any of the matters enumerated in the State List or in the Concurrent List. Section 22 of that Act provided :

1. (1958) S.C.J. 899 : (1959) S.C.R. 445.

2. (1951) S.C.J. 527 : (1951) S.C.R. 747.

“ If any provision of a law made by the Legislative Assembly of a State is repugnant to any provision of a law made by Parliament, then the law made by Parliament, whether passed before or after the law made by the Legislative Assembly of the State, shall prevail and the law made by the Legislative Assembly of the State shall, to the extent of the repugnancy, be void.

Explanation : For the purposes of this section, the expression ‘law made by Parliament’ shall not include any law which provides for the extension to the State of any law in force in any other part of the territory of India.”

In view of the decision of this Court in the *Delhi Laws Act case*¹, the Part C States (Miscellaneous Law) Repealing Act, 1951 (LXVI of 1951) was enacted by Parliament on 31st October, 1951. By section 2 of that Act, laws described in Column 2 of its Schedule were repealed or were deemed to have been repealed with effect from the dates specified in the corresponding entry in Column 3 of that Schedule. In the Schedule, the Vindhya Pradesh Sales Tax Ordinance, 1949 (II of 1949) was repealed from 29th December, 1950. The Vindhya Pradesh Legislative Assembly, which was set up, then passed the Vindhya Pradesh Laws (Validating) Act, 1952 (VI of 1952). By that Act, which was to extend to the whole of Vindhya Pradesh and to come into force on 8th January, 1953, it was provided as follows :

“ 2. For the removal of all doubts it is hereby declared that.....Central Provinces and Berar Sales Tax Act, 1947, as extended to Vindhya Pradesh under section 2 of the Part C States Laws Act, 1950 (has been) and shall be deemed to be in force in Vindhya Pradesh from 1st April, 1951.

7. *Repeal and savings* :—As from the dates of the actual enforcement of the Acts specified in section 2 of this Act the corresponding laws in force in Vindhya Pradesh immediately before the said dates shall be deemed to have been repealed without prejudice to anything done or suffered thereunder or any right, privilege, obligation or liability acquired, accrued or incurred thereunder before the aforesaid dates.”

Section 2 of the Central Provinces and Berar Sales Tax Act, 1947, which was extended to Vindhya Pradesh, defined “contract” to mean any agreement for the carrying out for cash or deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property, and further defined “goods” to mean all kinds of property including all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of immovable property, and finally defined “sale” as including a transfer of property in goods made in the course of the execution of a contract. By these definitions, the materials used or supplied by a building contractor in the construction of buildings, roads, bridges, etc., were made liable to sales tax in accordance with a schedule of rates, to which reference seems unnecessary.

The legality of these and similar provisions of law purporting to impose sales tax on building materials in State Acts came up for consideration before High Courts in India, and two well-defined views were expressed, one holding that the power to disentangle in a building contract the sale of materials from the execution of works with a view to taxing such a sale, was not beyond the legislative power of the States acting under Entry 48, List II, Seventh Schedule of the Government of India Act, 1935, corresponding to Entry 54 of the like List in the Constitution. It was held in those cases that a building contract, though entire, involved labour *plus* materials and in respect of the materials there was a sale involving transfer of property for consideration, and that the Legislature had the power to frame a definition of “sale” to separate the two. The other view was that building contracts were entire, and that there was no sale of goods as contemplated by the Indian Sale of Goods Act, which was the sense in which the Entry was framed, a sense which had a well-recognised legal import. This Court in *Gannon Dunkerley's case*², approved the latter view, which is found in the decision of the Madras High Court in *sub ngm Gannon Dunkerley v. State of Madras*³, and disapproved the contrary view. It was pointed out that though in a popular sense there was a sale of the materials, there was none in the sense in which the expression “sale of goods” is used in the Indian Sale of Goods Act, since there was no agreement to sell or sale of materials

1. (1951) S.C.J. 527: (1951) S.C.R. 747. 66: (1958) 2 An. W.R. (S.C.) 66: 1959 S.C.R. 379.
2. (1958) S.C.J. 696: (1958) 2 M.L.J. (S.C.) 3. (1955) 1 M.L.J. 87 : (1954) 5 S.T.C. 216.

as such, nor did the property pass therein as movables. In *Pandit Banarsi Das's case*¹, which was a case from the State of Madhya Pradesh and which was heard simultaneously, it was held that if the parties entered into distinct and separate contracts, one for transfer of materials for money consideration and the other, for payment of remuneration for services or works done, then there was a sale within the meaning of the Sale of Goods Act and the levy of tax was valid ; but that if the contract was an entire one, the levy was without competence. The sections of the Central Provinces and Berar Sales Tax Act making such a division and taxing the so-called sales of materials were declared to be beyond the powers of the State Legislature.

The petitioner contends that the impugned sections of the Central Provinces and Berar Sales Tax Act, as applied to Vindhya Pradesh, fell within these two rulings, and must also be declared *ultra vires* the Vindhya Pradesh State Legislature, when the latter enacted the Vindhya Pradesh Laws (Validating) Act, 1952.

As against this, the respondents contend that the Notification S.R.O. No. 6, which added section 29 repealing the Vindhya Pradesh Sales Tax Ordinance II of 1949, the Part C States (Miscellaneous Laws) Repealing Act, 1951 and the Vindhya Pradesh Laws (Validating) Act, 1952 all concurred in repealing Ordinance II of 1949 from 29th December, 1950, but left intact the operation of the Central Provinces and Berar Sales Tax Act as extended to Vindhya Pradesh by S.R.O. No. 6 of 1950. The Vindhya Pradesh Laws (Validating) Act, 1952, merely removed the doubts by stating again that the Central Provinces and Berar Sales Tax Act had been and "shall be deemed to be in force in Vindhya Pradesh from 1st April, 1951", but did not re-enact that Act. According to the respondents, the Central Provinces and Berar Sales Tax Act was in force in Vindhya Pradesh as a result of its extension by Notification S.R.O. 6 and Notification No. 52 (Econ.), the repeal of Ordinance II of 1949 being achieved by the Part C States (Miscellaneous Laws) Repealing Act, 1951, from 29th December, 1950. The respondents, therefore, seek to uphold the impugned provisions on the basis of the ruling of this Court in *Mithan Lal's case*², where it was pointed out that whatever might be said of the State Legislatures operating under List II did not hold good in the case of Parliament, which derived its powers in relation to legislation in Part C States, not only from all the Lists but also from the residuary powers of taxation mentioned in Article 248 (2). It was also held that section 2 of the Part C States (Laws) Act, 1950, was not repugnant to Article 248 (2), that the extended law became incorporated by reference in the Part C States (Laws) Act, and that the tax was thus one imposed by Parliament itself. The respondents, therefore, contend that, as held in *Mithan Lal's case*², when Parliament enacted the Part C States (Laws) Act, 1950, and conferred power on the Central Government to extend any Act of a Part A State to any Part C State, that power of extension carried with it the plenary powers of Parliament, and even though the law so extended might have been outside the competence of the State Legislature which enacted it, when extended under the authority of Parliament was a valid piece of law in a Part C State.

The rival contentions may be reduced to the proposition that if the State Legislature of Vindhya Pradesh extended the Central Provinces and Berar Sales Tax Act, then the extended Act would suffer from the disability pointed out in *Gannon Dunkerley's case*³; but if the Central Provinces and Berar Act was extended by the Notification under the Part C States (Laws) Act, 1950, then it must be treated as incorporated in that Act and to have the authority of Parliament which, in relation to Part C States, had no limitations whatever. We have, therefore, to see whether the Central Provinces and Berar Sales Tax Act, 1947, can be said to have been extended for the first time by the Vindhya Pradesh Legislature in 1952 when it passed the Vindhya Pradesh Laws (Validating) Act, 1952, to the exclusion of the order contained in the Notification No. S.R.O. 6, or whether the Act continued to

1. (1959) S.C.R. 427.

2. (1958) S.C.J. 899 : (1953) S.C.R. 445.

3. (1958) S.C.J. 696 : (1958) 2 M.L.J.

(S.C.) 66 : (1958) 2 An. W.R. (S.C.) 66 : (1959) S.C.R. 379.

be in force in Vindhya Pradesh even before, and all that the Vindhya Pradesh Act did was to remove any doubts about its validity.

The contention on behalf of the petitioner is that the Notification dated 29th December, 1950, was invalid in its latter part, as decided by this Court in the *Delhi Laws Act case*¹. That portion dealt with the repeal of Ordinance II of 1949, and if the Notification was invalid in that part, then the Central Provinces and Berar Sales Tax Act, which was extended by the opening part, never came into force. Mr. Viswanatha Sastri contended that the Notification must be looked at compendiously, and that it was impossible to think that the Central Government would have extended the Central Provinces and Berar Sales Tax Act, if the earlier Ordinance still continued to operate. He relied in this connection upon the observations of this Court in *Pesikaka's case*², to urge that the Notification, which was beyond the powers of the Central Government in its latter part, must be regarded as a nullity, and contended that if the invalid portion of the Notification was fundamental to the operation of the valid portion, then the valid portion also must equally fail, because it could not have been intended that two laws on the same topic were to operate simultaneously in Vindhya Pradesh. According to him, the extension of the Central Provinces and Berar Act could not and would not have been made, if the Ordinance had not been first repealed. Section 29 which was added, though composed of two parts, was, according to him, really a part of a single scheme and the repeal of the Ordinance and the extension of the Central Provinces and Berar Act could stand or fall together, and since the Ordinance was never validly repealed, it continued to operate in Vindhya Pradesh till its repeal on 31st October, 1951, by the Part C States (Miscellaneous Laws) Repealing Act, 1951, and when the Act repealed it from 29th December, 1950, the effect was that there was no sales tax law in operation in Vindhya Pradesh, because the Part C States (Miscellaneous Laws) Repealing Act, 1951, did not enact or extend any law on the subject of sales tax in or to Vindhya Pradesh. According to him, till the enactment of the Vindhya Pradesh Laws (Validating) Act VI of 1952, on 8th January, 1953, there was no law imposing sales tax in Vindhya Pradesh, and law was then made by the Legislature of Vindhya Pradesh by extending the Central Provinces and Berar Sales Tax Act from 1st April, 1951. He, therefore, contended that since the powers of the Vindhya Pradesh Legislature did not include the power of imposing sales tax on building materials, this Act of the Vindhya Pradesh Legislature, if it sought to impose sales tax on building materials, fell within the ruling in *Gannon Dunkerley's case*³, and must be declared as of no effect. He also referred to Act IX of 1953 passed by the Vindhya Pradesh State Legislature, by which the Act was further amended, and stated that the extended Act, as amended, owed its existence neither to Parliament nor to the Central Government acting under the Part C States (Laws) Act but to the Vindhya Pradesh Laws (Validating) Act, 1952 (VI of 1952) and the Vindhya Pradesh Amendment Act, 1953 (IX of 1953).

There is a fundamental fallacy involved in this reasoning. We are considering the applicability of the Central Provinces and Berar Sales Tax Act as extended to Vindhya Pradesh. The Vindhya Pradesh Amending Act made only verbal changes, but did not alter the structure of the tax. No doubt, that Act contained certain provisions under which sales of building materials are taxable, and if the authority to tax the so-called sales emanated from a State Legislature, then the law would fail. But we have to remember, in this connection, that the law was first extended to Vindhya Pradesh by the Central Government acting under the authority of Parliament legislating for a Part C State. Parliament and the Central Government were not subject to the disabilities pointed out in *Gannon Dunkerley's case*³, and the matter was covered by the decision of this Court in *Mithan Lal's case*⁴. Even if the Notification, S.R.O. No. 6, failed to repeal Ordinance II of 1949, Parliament by its own law effaced that Ordinance in Vindhya Pradesh from 29th December,

1. (1951) S.C.J. 527 : (1951) S.C.R. 747.
 2. (1955) An.W.R. (S.C.) 32 : (1955) S.C.J. 66 : (1958) 2 An.W.R. (S.C.) 66 : (1959) S.C.R. 73 : (1955) 1 M.L.J. (S.C.) 32 : (1955) 1 S.C.R. 379.
 3. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An.W.R. (S.C.) 66 : (1959) S.C.R. 73 : (1955) 1 M.L.J. (S.C.) 32 : (1955) 1 S.C.R. 379.
 4. (1958) S.C.J. 899 : (1959) S.C.R. 445.

1950, and enacted that the Ordinance shall be deemed to be repealed from that day. After the passing of the Repealing Act by Parliament, it is impossible to argue that Ordinance II of 1949 continued in Vindhya Pradesh down to 8th January, 1953, because by fiction the Ordinance was repealed from 29th December, 1950. Parliamentary legislation, therefore, came to the rescue, so to speak, of the Notification by making room for the extension of the Central Provinces and Berar Act by repealing Ordinance II of 1949 which the Notification *proprio vigore* was unable to achieve, as laid down in the *Delhi Laws Act case*¹. The Notification of the Central Government (S.R.O. No. 6) and Act, LXVI of 1951, therefore, concurred in removing the Ordinance on 29th December, 1950, and in extending the Central Provinces and Berar Sales Tax Act in its place on the same date.

Mr. Viswanatha Sastri argued, on the strength of the ruling of this Court in *Deepchand v. State of Uttar Pradesh*², that the validity of a law must be judged as on the date on which it was passed, and if the law was invalid on that date, then the law must be deemed not to have existed at all, unless it was later re-enacted. The passage relied upon is as follows :

"The validity of a statute is to be tested by the constitutional power of a Legislature at the time of its enactment by that Legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid without re-enactment if later, by constitutional amendment, the necessary legislative power is granted. An after acquired power cannot, *ex proprio vigore*, validate a statute void when enacted." (p. 24).

This argument would be applicable if we were to consider that Notification No. S.R.O. 6 in isolation, and the question was one of validation of that Notification. The Notification is being questioned, because it sought to repeal Ordinance II of 1949, which it could not do. But today we are not in a position to say that Ordinance II of 1949 continued in Vindhya Pradesh, because Parliament by the Part C States (Miscellaneous Laws) Repealing Act, 1951, has enacted that the said Ordinance must be deemed to have been repealed from 29th December, 1950. Indeed, in the ruling of this Court at the same page are cited passages from Willoughby on Constitution of the United States (Second Edition), Volume 1, page 10. based on the decision in *John M. Wilkerson v. Charles A. Rahrer*³, to the effect that if the cause of the unconstitutionality is removed then the law does not need to be re-enacted. The facts of this case are entirely different from those in *Deepchand's case*². The extended law did not depend on the repeal of the earlier law for its validity. It would have been operative, even if the earlier law was not repealed ; but the earlier law was, in fact repealed from 29th December, 1950, and no question of conflict between the new and the old law ever arose. Parliament by repealing the Ordinance rendered the ineffective portion of the Notification a mere surplusage. The necessary result thus was that its operative part survived and the Central Provinces and Berar Sales Tax Act, 1947, was validly extended to Vindhya Pradesh, and was valid law as laid down in *Mithan Lal's case*⁴. It did not suffer from the defects pointed out by this Court in *Gannon Dunkerley's case*⁵, as it was not enacted or extended by the State Legislature.

It remains to consider the last argument on this point, and it is that the Central Provinces and Berar Sales Tax Act was re-extended to Vindhya Pradesh by Act VI of 1952, and thus owed its existence to a law made by a State Legislature which was incompetent to enact a law that building materials in a works contract, which was entire, were liable to sales tax. The Preamble of the Act shows that it was enacted to remove certain doubts which were entertained as to whether the extended Sales Tax Act became operative only from 31st October, 1951, when Act LXVI of 1951 was passed, or from an earlier date, viz., 1st April, 1951, from which date it was brought into force in Vindhya Pradesh by Notification No. 52 (Econ.), dated 20th March, 1951. To remove these doubts, the Vindhya Pradesh Laws (Validating) Act, 1952, enacted with the assent of the President, declared

1. (1951) S.C.J. 527 : (1951) S.C.R. 747.

4. (1958) S.C.J. 899 : (1959) S.C.R. 445.

2. (1959) S.C.J. 1069 : (1959) Supp. 2 S.C.R. 8, 24.

5. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An. W.R. (S.C.) 66 : (1959) S.C.R. 379.

3. (1891) 140 U.S. 545 : 35 L. Ed. 572.

by section 2 (already quoted) that the Central Provinces and Berar Sales Tax Act had been and "shall be deemed to be in force in Vindhya Pradesh from 1st April, 1951." This declaration did not extend *proprio vigore* the Central Provinces and Berar Sales Tax Act, but only declared that it must be deemed to be validly in force from 1st April, 1951. Section 7, on which much reliance has been placed, may be quoted again :

"*Repeal and savings* :—As from the dates of the actual enforcement of the Acts specified in section 2 of this Act the corresponding laws in force in Vindhya Pradesh immediately before the said dates shall be deemed to have been repealed without prejudice to anything done or suffered thereunder or any right, privilege, obligation or liability acquired, accrued or incurred thereunder before the aforesaid dates."

It is said that, if the two sections are read together, they mean that the Central Provinces and Berar Sales Tax Act was freshly extended from 1st April, 1951, by the Vindhya Pradesh Act and any law made by any authority earlier was freshly repealed to make room for the extension. This argument, in our opinion, is erroneous.

To begin with, the powers of the Vindhya Pradesh Legislature were circumscribed by section 22 of the Government of Part C States Act, 1951, quoted earlier. Under that section, the powers of the State Legislatures did not extend to making laws repugnant to any law made by Parliament. The *Explanation* defines the expression "law made by Parliament", and excludes a law which provides for the extension to the State of any law in force in any other part of the territory of India. The Vindhya Pradesh Legislature, however, did not repeal either section 2 of the Part C States (Laws) Act or the Notification, and all that the Legislature did, was to add its own authority, by a declaration, to the laws earlier extended. The law was extended first by Notification S.R.O. No. 6 on 29th December, 1950, but it was brought into force only by Notification No. 52 (Econ.) dated 20th March, 1950 from 1st April, 1951. The Notification S.R.O. No. 6 had substituted for sub-section (3) of section 1 of the Central Provinces and Berar Sales Tax Act, the following :

"(3) It shall come into force on such date as may be notified by the Central Government in the Official Gazette."

Till the Notification No. 52 (Econ.) was made, the Act was extended but was not in force in Vindhya Pradesh. There is a difference between the extension of a law subject to its being brought into force later and its coming into force on a later date. Section 6 of Act VI of 1952 repealed only the law in force prior to the date on which the Central Provinces and Berar Sales Tax Act was brought into force. It speaks of "laws in force in Vindhya Pradesh immediately before 1st April, 1951, and the law which was in force immediately before that date was not the Central Provinces and Berar Sales Tax Act which had not been brought into force, but might be Ordinance II of 1949, if it had not been successfully repealed earlier. The former Act was extended on 29th December, 1950, but was not brought into force till 1st April, 1951, and the section speaks of "laws in force". The section, therefore, refers to Ordinance II of 1949 which would be in force immediately before 1st April, 1951, if not successfully repealed, but not to the Central Provinces and Berar Sales Tax Act, which was only extended before that date but had not been brought into force. In other words, section 7 of the Act does no more than repeal from 1st April, 1951 (if repeal was at all necessary) Ordinance II of 1949 which might be supposed to have continued as law till 31st October, 1951, when it was repealed by Act LXVI of 1951. In point of fact and also in law, it was really repealed from 29th December, 1950, under the Repealing Act LXVI of 1951. The Vindhya Pradesh Act VI of 1952 cannot, therefore, be said to have enacted for the first time that the Central Provinces and Berar Sales Tax Act shall come into force from 1st April, 1951, in Vindhya Pradesh. It only declared what was a legal fact even without this declaration. Nor did the Central Provinces and Berar Sales Tax Act owe its existence to Act VI of 1952. Act VI of 1952 only declared what the result of the earlier laws was, and added the authority of the Vindhya Pradesh Legislature to remove doubts and to save the law from any attack on

the ground that the wrong Legislature had repealed the Ordinance or extended the Central Provinces and Berar Sales Tax Act. In our opinion this argument cannot be accepted.

One further argument was advanced to which we have not referred so far and which may now be noticed. It is that after the reorganisation of the States, Madhya Pradesh has as many as four Sales Tax Acts. It is contended that a person belonging to the area of the former State of Madhya Pradesh is not liable to sales tax on building materials in a works contract under the Central Provinces and Berar Sales Tax Act because of the decision in *Pandit Benarsi Das's case*¹, but another person living in the area forming part of the former Vindhya Pradesh is liable to sales tax under the same Act, as extended to Vindhya Pradesh. This, it is said, is patently contrary to the spirit of the equal protection clause in Article 14.

The laws in different portions of the new State of Madhya Pradesh were enacted by different Legislatures, and under section 119 of the States Reorganisation Act, all laws in force are to continue until repealed or altered by the appropriate Legislature. We have already held that the Sales Tax Law in Vindhya Pradesh was validly enacted, and it brought its validity with it under section 119 of the States Reorganisation Act, when it became a part of the State of Madhya Pradesh. Thereafter, the different laws in different parts of Madhya Pradesh can be sustained on the ground that the differentiation arises from historical reasons, and a geographical classification based on historical reasons has been upheld by this Court in *M.K. Prithi Rajji v. The State of Rajasthan*², and again in *The State of Madhya Pradesh v. The Gwalior Sugar Co., Ltd. and others*³. The latter case is important, because the sugarcane cess levied in the former Gwalior State but not in the rest of Madhya Bharat of which it formed a part, was challenged on the same ground as here, but was upheld as not affected by Article 14. We, therefore, reject this argument.

In the result, the Writ Petitions fail and are dismissed ; but in the circumstance of the case, we make no order about costs.

K.L.B.

Petitions dismissed.

THE SUPREME COURT OF INDIA.

PRESENT:—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Commissioner of Income-tax, Bombay

*.. Appellant**

v.

James Anderson

.. Respondent.

Deceased shareholder—Death before annual general meeting—Legal representative not substituted in share register—Distribution order on company after year of death—Deemed dividend, whether taxable on legal representative.

Income-tax Act (Act XI of 1922), sections 23-A (before amendment by Finance Act, 1955) and 24-B-1.

G died on 13th April, 1945. A obtained letters of administration on 14th August, 1946, of G's estate, which included 2,224 shares in a private limited company. These shares were transferred to M, but in the company's share register the shares continued to stand in the name of G, because the transfer was not duly registered. On 26th March, 1953, the Income-tax Officer passed a distribution order on the company under section 23-A of the Indian Income-tax Act, 1922, with reference to the company's undistributed income assessable for 1946-47 and 1947-48, deeming it to have been distributed as on the relevant dates of the annual general meetings held on 26th May, 1947 and 22nd December, 1947, respectively. The dividends assessable on the 2,224 shares by virtue of the distribution order were Rs. 61,051 and Rs. 3,73,099 and both the amounts were brought to tax in the hands of A as "Administrator to the estate of the late G" as income deemed to be distributed to A during the account year relevant to the assessment year 1948-49. A questioned the assessment, but without success. The High Court, however, on Reference held the assessment to be illegal. On appeal by the Commissioner of Income-tax, by Special Leave.

Held that the Indian Income-tax Act, 1922, does not contain machinery for assessing dividends deemed to have been distributed by virtue of an order under section 23-A in respect of shares held by a shareholder, when before the date on which the fiction of distribution becomes effective *viz.*,

1. (1959) S.C.R. 427.

3. C.A. Nos. 98 and 99 of 1957 decided

2. C.A. No. 327 of 1956 decided on 2nd November, 1960.

* C.A. No. 128 of 1963.

2nd December, 1963.

the date of the relevant general meeting of the company—the registered shareholder has died and his representatives have not been substituted in the register of the company.

The general provisions of section 24-B for enforcement of liability against the legal representative of a deceased person to pay tax which would have been payable if such person had not died has only a limited application.

The legal personality of *G* came to an end, for the purposes of section 24-B, at the end of the account year in which *G* died, and no tax could be levied under section 24-B on the dividends deemed to have been received by him or his legal representatives after the end of that year.

Section 24-B does not warrant the application of two different interpretations in the matter of extension of the legal personality of the deceased, according as the income is actual or notional.

Appeal by Special Leave from the Judgment and Order dated 21st September, 1961, of the Bombay High Court in Income-tax Reference No. 32 of 1959.

N. D. Karkhanis, R. N. Sachthey and B. R. G. K. Achar, Advocates, for Appellant.

R. J. Kolah, Advocate and *J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Henry Gannon who was a registered holder of 2,674 shares of Gannon Dunkerley & Co., a private limited company with its registered office in Bombay, died on May 13, 1945, having made and published a will disposing of extensive estates in the United Kingdom and in British India. The National Bank of India Ltd., obtained probate of Gannon's will in the United Kingdom and appointed the respondent, James Anderson, its attorney to administer the estate in British India. Anderson applied for and obtained in India on August 14, 1946, Letters of Administration "*durante absentia*" to the estate of Gannon in British India. 450 out of the shares were specifically bequeathed by Gannon to certain legatees, and, in the course of administration, share certificates with transfer forms duly executed were delivered to the legatees in respect of those shares, and no question arises in this appeal in regard to those shares.

By agreement dated August 14, 1946, between the executor to the estate, the Company and one Morarka, the executor, agreed to sell the remaining 2,224 shares of the Company to Morarka, and, pursuant thereto, the relevant share certificates with transfer deeds were handed over to Morarka on October 12, 1946, against payment of the price at the rate of Rs. 140 per share. Morarka, for some reason which is not clear from the record, failed to present the transfer deeds and the share certificates for registration at the office of the Company, and the name of Gannon remained at all material times on the register of shareholders in respect of those 2,224 shares.

In the assessment of the Company for the assessment years 1946-47 and 1947-48, the Income-tax Officer, Bombay, made an order on March 26, 1953, under section 23-A of the Income-tax Act, 1922 (as it then stood) that certain undistributed parts of the assessable income of the Company shall be deemed to have been distributed as dividends amongst the shareholders as at the dates, viz., May 26, 1947, and December 22, 1947, of the general meetings of the Company. The net dividends so deemed to be distributed in respect of the shares were Rs. 61,051 and Rs. 3,73,099. The Income-tax Officer then issued on March 28, 1953, a notice under section 34 (1) (b) of the Income-tax Act addressed to "James Anderson, Administrator to the Estate of late Mr. Henry Gannon" reciting that he had reason to believe that Anderson's "income assessable to income-tax for the year ending 31st March, 1949," had escaped assessment and that he proposed to re-assess the escaped income, and for that purpose called upon Anderson to make a return of his total income and the total world income assessable for the year ending March 31, 1949. In compliance with the requisition, Anderson submitted a return, but did not include therein the dividend deemed to have been distributed under the order dated March 26, 1953. The Income-tax Officer in his order of assessment included the dividends deemed to be distributed and after processing the amount under section 18 (5), included it

in the total income of Anderson and levied tax thereon at the appropriate rate. Anderson's appeals against the order of the Income-tax Officer to the Appellate Assistant Commissioner and to the Income-tax Appellate Tribunal, Bombay, were unsuccessful.

At the instance of Anderson, the following questions were referred by the Tribunal to the High Court of Bombay under section 66 (1) of the Income-tax Act :—

“(1) Whether in the facts and in the circumstances of the case the assessment made on Mr. James Anderson, Administrator to the estate in India of Mr. Henry Gannon (deceased) is valid in law? If the above question is answered in the affirmative.

(2) Whether in the facts and in the circumstances of the case the dividends of Rs. 61,051 and Rs. 3,73,099 deemed to have been distributed on 26th May, 1947 and 22nd December, 1947 respectively under section 23-A of the Income-tax Act were assessable in the hands of the applicant?”

The High Court answered the first question in the negative, and declined to answer the second question.

With Special Leave, the Commissioner of Income-tax, Bombay, has appealed to this Court.

The estate of Gannon to which the Letters of Administration relate, vested by virtue of section 211 of the Indian Succession Act, in Anderson, but he did not take steps to get his name entered in the register of shareholders maintained by the Company, and the Income-tax Officer sought to tax the dividends deemed to have been distributed in the hands of Anderson as administrator of the estate of Gannon. The order made by the Income-tax Officer under section 23-A gives rise to a notional income: it merely creates a fiction about distribution and consequential receipt of dividend. The order by its own force, however, does not charge the income to tax: it has to be followed by an order of assessment to make tax on such income exigible.

The sole question in this appeal is whether the Act contains machinery for assessing dividends deemed to have been distributed by virtue of an order under section 23-A in respect of the shares held by a shareholder, when before the date on which the fiction of distribution becomes effective—viz., the date of the relevant general meeting of the company the registered shareholder has died and his representatives have not been substituted in the register of the company.

It was held by this Court in *Commissioner of Income-tax, Bombay City II v. Shakuntala and others*¹, following *Howrah Trading Company Ltd. v. Commissioner of Income-tax, Central, Calcutta*², that the expression “shareholder” in section 23-A of the Indian Income-tax Act, 1922, means a shareholder registered in the books of the company, and such shareholder alone is liable to be taxed in respect of the dividend deemed to be distributed. Counsel for the Commissioner submits that the principle of those cases applies only when the registered shareholder is alive and the beneficial ownership in the shares is vested as a result of some transaction *inter vivos* in a person in whose name the shares do not stand in the Company's register, but not where by the grant of representation to the estate of a registered shareholder who has died, the representative is invested, without his name being entered in the register, with the rights of the shareholder.

Whether on the death of a shareholder his executor or administrator may enforce the rights of the shareholder or incur liability in respect of the shares to the Company, depends, upon the nature of the right and the obligation, and terms of the statute and the articles of the company which create those rights and obligations. The legal representative of a deceased person cannot vote on behalf of the shareholder, and may not become a director of the Company on the strength of the representation alone. Again, by the express provision contained in section 35 of the Indian Companies Act, 1913, a transfer of the share or other interest of a deceased member by his legal representative, although he is himself not a member, is as valid as if he were a member at the time of the execution of the transfer. This implies that the legal

1. (1963) 1 S.C.J. 283 : (1963) 2 S.C.R. 871 : 43 I.T.R. 352.

2. (1959) S.C.J. 1133.

representative does not acquire, in all cases, the rights of a shareholder of a company in respect of shares of which the name of the deceased was registered as holder. But, if the estate of a shareholder of a company is, by virtue of the Articles of the Company, liable in respect of calls upon shares, whether made during the life-time of the holder or after his death, the legal representative is obliged to satisfy the calls in his representative character. This obligation arises not because the legal representative becomes, by virtue of probate or letters of administration, a shareholder in place of the person whose estate is vested in him, but because as a representative it is his duty to discharge the obligations enforceable against the estate.

Under an order made by the Income-tax Officer under section 23-A of the Indian Income-tax Act, 1922, dividend is deemed to be distributed among the shareholders, and, by the express provision contained in the statute, the proportionate share of the dividend of each shareholder has to be included in the total income of such shareholder for the purpose of assessing his total income. The statute therefore in terms applies to the shareholder and makes the dividend taxable as his income. The obligation to pay the tax on the dividend so deemed to be distributed is of the shareholder, and may be enforced against him or his legal representative in the manner and to the extent the statute permits. There is no special machinery devised by the Income-tax Act enabling assessment and levy of tax in respect of such deemed income from the estate of the shareholder in the hands of his legal representative, when the order of the Income-tax Officer pursuant to which the income was to be deemed to be distributed becomes effective was made after the death of the shareholder, and the general provision in section 24-B for enforcement of liability against the legal representative of a deceased person to pay tax which would have been payable if such person had not died, has a limited application.

In *Commissioner of Income-tax, Bombay v. Ellis C. Reid*¹, it was observed by the Bombay High Court in rejecting the claim made by the Income-tax Department to assess a deceased person's estate in the hands of his legal representative to tax, that the definition of "assessee" in section 2 (2) of the Indian Income-tax Act, 1922 (as it stood at the material date) in terms only applied to a living person, the words being "a person by whom income-tax is payable" and not "a person by whom or by whose estate income-tax is payable", and in the absence of appropriate provisions for collecting tax from the estate of a deceased person in the Act, the claim of the Income-tax Officer to make an assessment under section 23 (4) must fail. The Court also observed that throughout the Income-tax Act there is no reference to the decease of a person on whom the tax had been originally charged, and it was difficult to suppose that the omission was unintentional. In *Reid's case*¹, the tax-payer had died after the commencement of the financial year but before the income of the previous year was assessed, and it was held that the executors under the will of the tax-payer were not liable to pay tax on receipt of income due to the deceased, notwithstanding that he died while assessment proceedings were pending, because the proceedings could not be continued and the assessment could not be made after the tax-payer's death.

To rectify the lacuna in the machinery of assessment, the Legislature enacted section 24-B by the Indian Income-tax (Second Amendment) Act, XVIII of 1933. The first sub-section of section 24-B provided :

"Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died."

In interpreting that enactment this Court held in a recent case : *Commissioner of Income-tax, Bombay City I v. Amarchand N. Shroff*², that by the incorporation of section 24-B the Legislature has extended the legal personality of a deceased person,

1. (1930) I.L.R. 55 Bom. 312.

2. (1963) 48 I.T.R. (S.G.) 59 : (1963) 1 I.T.J.

224 : (1963) 1 S.C.J. 411.

for the duration of the entire previous year in the course of which he died, and therefore the income either received by him before his death or by his heirs and representatives after his death in that previous year becomes assessable to tax in the relevant assessment year, but not the income received in the year subsequent to the previous or account year. In *Amarchand Shroff's case*¹, A who was a partner in a firm of solicitors which maintained accounts "on cash basis" died on July 7, 1949. Outstandings of the firm in respect of professional services rendered prior to the death of A were realized during five years subsequent to A's death and were divided between the partners of the firm and certain sums were paid to the heirs and legal representatives of 'A' as his share. The Income-tax Department sought to assess the amounts received by the legal representative of A as his share to tax under section 34 (1) (b) read with section 24-B. It was held that section 24-B did not authorise the levy of tax on receipts by the legal representative of a deceased person in the years of assessment succeeding the year of account in which such person died and accordingly the income received by him before his death and that received by his heirs and legal representatives after his death in that previous year became assessable to income-tax in the relevant assessment year, but not receipts by the legal representatives after the expiry of the account year in which A died.

In the case before us Gannon died in May 1945, and the dividend in respect of which orders under section 23-A were passed was deemed to be distributed in the year of account (*sic*) ending March 31, 1949. The legal personality of Gannon as held in *Amarchand Shroff's case*¹ came to an end for the purpose of section 24-B at the end of the account year in which Gannon died, and no tax could be levied under section 24-B on the dividends deemed to have been received by him or his legal representatives after the end of that year. Counsel for the Commissioner sought to rely on the following observations made by Kapur, J., who spoke for the Court in *Amarchand Shroff's case*¹.

"In the present case the amounts which are sought to be taxed and which have been held not to be liable to tax are those which were not received in the previous year and are therefore not liable to tax in the several years of assessment. It cannot be said that they were income which may be deemed by fiction to have been received by the dead person and therefore they are not liable to be taxed as income of the deceased, Amarchand, and are not liable to be taxed in the hands of the heirs and legal representatives who cannot be deemed to be assessee for the purpose of assessment in regard to those years",

and on the latter part of the opinion sought to raise two arguments (1) that even if after the expiry of the year of account receipts which, if the person earning had not died, would have been treated as his income, ceased to be liable to assessment as income of the deceased, they could still be taxed as his income in the hands of the legal representatives, and (2) that where the income was notional as under section 23-A, the legal personality of the deceased must be regarded as extended to the end of the year in which such notional income must be deemed to have been received by the legal representatives of the deceased.

The first argument is plainly inconsistent with what was decided in *Amarchand Shroff's case*.¹ In that case the Court held that the receipts by the heir or legal representative for professional services rendered by the deceased solicitor were liable to be brought to tax in the hands of the legal representatives only to the limited extent permitted by section 24-B. The second argument involves the importation into the expression "deemed by fiction to have been received" a concept which was wholly alien to what was decided by the Court, for in *Amarchand Shroff's case*¹, the Court was dealing not with a fiction of distribution by an order under section 23-A of dividends which never reached the shareholder or his legal representative, but to a fiction of receipt by a deceased person of income by extending his legal personality. Section 24-B does not warrant the application of two different interpretations in the matter of extension of the legal personality of the deceased according as the income is actual or notional. Section 24-B, in terms, refers to the liability

of the legal representative to pay tax assessed as payable by such deceased person, or any tax which would have been payable by him under the Act if he had not died, and, if the expression "tax which would have been payable under this Act, if he had not died" is intended to impose liability for tax on income received in the year of account in the course of which the tax-payer died, a different interpretation of the same expression in the context of notional income would be impermissible. The Legislature not having made any provision generally for assessment of income receivable by the estate of the deceased person, the expression "any tax which would have been payable by him under this Act if he had not died" cannot be deemed to have supplied the machinery for taxation of income received by a legal representative to the estate after the expiry of the year in the course of which such person died.

It was then urged that apart from section 24-B, the legal representatives of a deceased person also represent his estate in the matter of taxation of income, and it is competent to the taxing authorities to assess them on income received on behalf of the estate. Counsel did not rely upon any specific provision of the Act in support of the contention, and merely asserted that the Act seeks to tax all assessable incomes, and income received by a legal representative of the estate of a deceased person should not be permitted to escape tax to the detriment of public revenue. But if the Legislature has failed to set up the procedure to assess such income, the Courts cannot supply it. The expression "assessee" in section 2 (2) as substituted by the Indian Income-tax (Amendment) Act XXV of 1953, with effect from April 1, 1952, means a person by whom income-tax or any other sum of money is payable under the Act, and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him. By section 3 where income-tax is chargeable for any year at any rate or rates prescribed by the Act of the Central Legislature, tax at that rate shall be charged for that year in accordance with and subject to the provisions of the Act in respect of the total income of the previous year of every individual, Hindu undivided family, company, and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually. The charge to income-tax has therefore to be in accordance with, and subject to the provisions of the Act, and the Legislature has not provided that the income received by a legal representative which would, but for the death of the deceased, have been received by such deceased person, is to be regarded for the purpose of assessment as the personal income of the legal representative. To assess tax on such receipts on the footing that it is the personal income of the legal representative is to charge tax not in accordance with the provisions of the Act.

We therefore agree with the High Court, though for somewhat different reasons. The appeal therefore fails and is dismissed with costs.

V.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Commissioner of Income-tax, Punjab

.. *Appellant**

v.

Indian Woollen Textiles Mills

.. *Respondent.*

Income-tax Act (XI of 1922), section 66 (1) and (2)—High Court—Direction to Appellate Tribunal to state a case—Scope of jurisdiction—Appellate Tribunal—Misdirection in law—Finding of fact—Based on some evidence—Other essential matters ignored—Finding, whether gives rise to question of law.

The assessee, a firm of eight partners, carrying on business at Amritsar with branches in various other places was a newly established industrial undertaking entitled to exemption under section 15-C of the Indian Income-tax Act, 1922 on its profits equivalent to 6 per cent. on the capital employed

* C.A. No. 96 of 1963.

in the undertaking. In the computation of capital for purposes of exemption for the assessment year 1951-52, the assessee claimed to include Rs. 3,21,460 advanced by it to another partnership concern during the relevant previous year. The Income-tax Officer rejected the assessee firm's claim. The Appellate Assistant Commissioner, in appeal, upheld the Officer's decision, finding that the other partnership concern, to which Rs. 3,21,460 had been advanced, was composed of the same eight persons as partners who were also partners in the assessee-firm, while also finding that the other partnership concern had carried on business and had been separately assessed to income-tax at Bombay, apparently for assessment years *subsequent* to 1951-52. On further appeal, the Tribunal upheld the assessee's claim on the assumption that for the assessment year 1951-52 the income of the other partnership concern was not included in the assessee-firm's assessment. The Tribunal did not consider the other question whether the constitution of the two firms was the same. The assessee-firm applied to the Tribunal under section 66 (1) of the Act, to state a case to the High Court. The Tribunal refused on the ground that no question of law arose out of its order in appeal. The assessee thereupon moved the High Court under section 66 (2) of the Act, for a direction requiring the Tribunal to state a case. The High Court declined to do so, holding that the Tribunal's finding was one of fact and was based on the non-inclusion of the other firm's income in the assessment of the assessee. On appeal, by Special Leave, against the High Court's decision made under section 66 (2).

Held, that the High Court has the power to call upon the Tribunal to state a case not only where in the High Court's view, a question of law arises out of the order of the Tribunal, but also where the Tribunal has misdirected itself in law in arriving at its finding.

While it is not open to the High Court to discard the Tribunals' finding of fact, if there is some evidence to support the finding on a question of fact, even if on a review of the evidence, the High Court might arrive at a different conclusion it must appear that the Tribunal had considered evidence covering all essential matters before arriving at its conclusion. If the conclusion of the Tribunal is based upon some evidence ignoring other essential matters, such a finding does give rise to a question liable to be referred to the High Court.

Held, further, that the Tribunal's conclusion, in this case, suffered from a double infirmity : it assumed the only fact on which its conclusion was founded ; it ignored other relevant factors on which the Appellate Assistant Commissioner relied in support. The Tribunal therefore misdirected itself in law in arriving at its finding. The High Court was therefore in error in refusing to require the Tribunal to state a case.

Appeal by Special Leave from the Judgment and Order dated 13th October, 1960, of the Punjab High Court in Income-tax Case No. 21 of 1958.

K. N. Rajagopal Sastri, Senior Advocate, *R. N. Sachthey*, Advocate, with him, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, *N. N. Keswani*, Advocate, with him, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—M/s. Indian Woollen Textiles Mills, Amritsar (hereinafter called 'the assessee') had branches at different places in India, one of which was an industrial undertaking conducted in the name of Eldee Velvet and Silk Mills—called for the sake of brevity "Eldee". "Eldee" had advanced Rs. 3,21,460 to another concern, the Bombay Fine Worsted Manufacturers' Castle Mills—hereinafter called, 'Castle.' In the assessment year 1951-52, the assessee claimed under section 15-C of the Indian Income-tax Act, 1922, exemption from tax in respect of 6% of the capital employed in 'Eldee' as a newly established undertaking and sought to include in the computation of the capital so employed Rs. 3,21,460 advanced to 'Castle'. The Income-tax Officer, Special Circle, Amritsar, and the Appellate Assistant Commissioner rejected the claim. But the Income-tax Appellate Tribunal modified the assessment and directed inclusion of the amount advanced to 'Castle' in the computation of capital invested for the purpose of section 15-C. An application submitted under section 66 (1) of the Indian Income-tax Act to the Tribunal to refer a question which it was contended by the Commissioner arose out of the order of the Tribunal was rejected, and the petition of the Commissioner under section 66 (2) for an order directing the Tribunal to state the case and refer it to the High Court was also dismissed. With Special Leave the Commissioner has appealed to this Court.

The question in dispute before the Revenue Authorities was whether the business called 'Castle' at Bombay was a branch of the assessee. The Appellate Assistant Commissioner rejected the claim of the assessee to include the amount of Rs. 3,21,460 in the capital employed in the undertaking 'Eldee', because in his view there were in

these two undertakings the same eight partners with a share of -/2/- (two annas) each, and that the constitution of both the undertakings being the same, 'Castle' could not be regarded as a separate entity. The Tribunal disagreed with the view of the Appellate Assistant Commissioner, relying upon only one circumstance, *viz.*, that in the assessment for the year 1951-52 the income from 'Castle' had not been computed and included in the assessment of the assessee. It did not consider the other question whether the constitution and ownership of the two businesses "were the same". The High Court declined to require the Tribunal to state the case holding that the finding of the Tribunal was one of fact as it was based on the inference arising from the non-inclusion by the Income-tax Officer in the assessment in question of the income of 'Castle' and that "the factor taken into consideration by the Appellate Tribunal in coming to the conclusion, it did" was a relevant factor.

Section 66 (2) invests the High Court with jurisdiction to require the Appellate Tribunal to state a case and to refer it, if the Appellate Tribunal has refused to state the case on the ground that no question of law arises, and the High Court being approached by the aggrieved party within the period of limitation prescribed, is not satisfied about the correctness of the decision of the Appellate Tribunal refusing to state the case. Under the Income-tax Act it is for the Tribunal to decide all questions of fact: the High Court has the power merely to advise the Tribunal on questions of law arising out of the order of the Tribunal. In so advising the High Court must accept the finding of the Tribunal on matters of appreciation of evidence. But the refusal of the Tribunal to state a case for the opinion of the High Court, on the view that a question of law does not arise out of the order is not conclusive. The High Court has the power to call upon the Tribunal to state the case, if, in its view, a question of law arises out of the order of the Tribunal. Such a question may arise out of the findings of the Tribunal, and also if the Tribunal has misdirected itself in law in arriving at its finding. It is not open to the Court to discard the Tribunal's finding of fact, if there is some evidence to support the finding of the Tribunal on a question of fact, even if on a review of the evidence the Court might have arrived at a different conclusion. It must, however, appear that the Tribunal had considered evidence covering all the essential matters before arriving at its conclusion. If the conclusion of the Tribunal is based upon some evidence ignoring other essential matters, it cannot be regarded as a finding not giving rise to a question liable to be referred to the Court.

Non-inclusion of the income of 'Castle' in the assessment of the assessee may have been a relevant circumstance, but its effect had to be considered in the light of other circumstances on which the Appellate Assistant Commissioner had relied. Moreover, reliance placed by the Tribunal upon the single circumstance on which its decision was founded had proceeded on an assumption that in the previous year to the year of assessment 1951-52, 'Castle' had carried on business and had earned income. The observations made by the Appellate Assistant Commissioner about 'Castle' being separately assessed at Bombay in the status of a registered firm apparently refer to assessment of that business in subsequent years and not in the year of assessment 1951-52. The conclusion of the Tribunal therefore suffers from a double infirmity: it assumes the only fact on which its conclusion is founded and ignores other relevant matters on which the Appellate Assistant Commissioner relied in support of his conclusion. The Tribunal has therefore misdirected itself in law in arriving at its finding, and in refusing to require the Tribunal to state the case and to refer it, the High Court was, in our view, in error.

The appeal is therefore allowed and the proceedings are remanded to the High Court with a direction to proceed accordingly to law. Costs in this appeal will be costs in the High Court.

V. B.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT:—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Commissioner of Income-tax, Andhra Pradesh, Hyderabad .. Appellant*

v.

Raja Reddy Mallaram

.. Respondent.

Income-tax Act (XI of 1922), sections 23 (4), 34 and 63 (2).—Association of persons—Dissolution—Discontinuance of business—Unit and mode of assessment—Liability of quodam member—Whether dependent on service of individual notice.

An association of persons, consisting of three members, which carried on business in liquor shops discontinued its business with the end of Fasli 1358. On the discontinuance of the business, the association was dissolved. The association did not make a return for the relevant assessment year pursuant to a notice under section 22 (1) of the Indian Income-tax Act, 1922. The Officer issued a notice under section 34, calling upon one of the members to file a return for the association, and, on his failure to do so, made an *ex parte* assessment on the association, estimating the income at Rs. 51,000 and assessing the tax demand at Rs. 8826-14-0. The amount could not be recovered from the member on whom the assessment was made, and hence the Officer issued another notice of demand addressed to another quodam member of the same association. This member applied under section 27 of the Act to set aside the *ex parte* assessment. The application was rejected by the Officer, but allowed in appeal by the Appellate Assistant Commissioner. The Income-tax Officer appealed to the Appellate Tribunal which remanded the case to the Appellate Assistant Commissioner to consider whether the other member on whom the notice of assessment was later served was prevented by sufficient cause from making the return. Thereupon, at the instance of the other member, the Tribunal stated a case to the High Court referring the question whether the assessment on the dissolved association of persons was bad in law. The High Court answered the question in the affirmative, observing that the assessment was made on the dissolved association and was not a joint and several assessment on the persons who were members of the association at the time of dissolution. The High Court also held that the assessment was bad as against the members who were not served with the notices under sections 34 and 22 of the Act. On appeal by the Commissioner of Income-tax,

Held, that the assessment made on the association after its dissolution is valid under section 44 of the Indian Income-tax Act, 1922.

The effect of section 44 is merely to ensure continuity in the application of the machinery for assessment and imposition of tax liability, notwithstanding discontinuance of the business of the association or its dissolution. By virtue of section 44 the personality of the association is continued for the purpose of assessment. What can be assessed is the income of the association received prior to its dissolution, and the members of the association would be jointly and severally assessed thereto in their capacity as members of the association.

The procedure for purposes of such assessment is that applicable for assessment of the income of the association, as if it had continued. A notice to the appropriate person under section 63 (2) would be sufficient to enable the authority to assess to tax the association. The plea that the respondent not having been served personally with the notice of assessment is not liable to pay the tax assessed cannot be sustained.

Appeal from the Judgment and Order, dated 19th January, 1960 of the Andhra Pradesh High Court in Case Referred No. 7 of 1958.†

K. N. Rajagopal Sasiri, Senior Advocate, R.N. Sachithy, Advocate, with him, for Appellant.

K. Bhimasankaram, Senior Advocate, K. R. Sharma, Advocate, with him, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Baba Gowd, P. V. Rajareddy and Rajareddy Mallaram formed an association of persons called “Nizamabad Group Liquor Shops” (called for the sake of brevity ‘the Group’). For the Fasli year 1358, i.e., October 1, 1948 to September 30, 1949 the Group carried on business in liquor contracts obtained from the former State of Hyderabad. With the end of Fasli year 1358 the contracts came to an end. The business was then discontinued, and the Group was dissolved. The Group did not make a return of its income pursuant to the general notice under section 22 (1) of the Indian Income-tax Act. The Income-tax Officer, Nazamabad Circle, issued a notice under section 34 of the Income-tax Act calling upon Baba Gowd—

* C.A. No. 290 of 1963.

20th November, 1963;

† (1960) 2 An.W.R. 54.

one of the members of the Group—to file a return of the income of the Group, but Baba Gowd failed to file the return on the due date. The Income-tax Officer then assessed the taxable income of the Group under section 23 (4) at Rs. 51,000 and determined Rs. 8,826,14-0 as the tax payable. Attempts made by the Income-tax Department to recover the tax from Baba Gowd having proved unsuccessful, on March 13, 1954, the Income-tax Officer issued a notice of demand addressed to Rajareddy Mallaram another member of the Group. The latter then applied under section 27 of the Indian Income-tax Act for cancellation of the assessment. The application was rejected by the Income-tax Officer. In appeal to the Appellate Assistant Commissioner, the order was set aside, and the Income-tax Officer was directed to cancel the order of assessment under section 23 (4) and to make a fresh assessment after giving an opportunity to Rajareddy Mallaram to file a return and to produce the books of account of the dissolved Group. The Income-tax Appellate Tribunal, Hyderabad Branch, modified the order of the Appellate Assistant Commissioner. The Tribunal held that a valid order of assessment under section 23 (4) having already been made in the case, there could be no occasion to issue a fresh notice to Rajareddy Mallaram or to make a fresh assessment but somewhat inconsistently with that opinion, the Tribunal directed that the Appellate Assistant Commissioner do consider whether Rajareddy Mallaram had been prevented by sufficient cause from making the return.

At the instance of Rajareddy Mallaram the following two questions were referred to the High Court of Andhra Pradesh by the Tribunal :

“(1) On the facts and in the circumstances of the case, was the order of assessment made by the Income-tax Officer under section 23 (4) on 30th September, 1953 bad in law ?

(2) If the answer to the above question is in the negative, was not the applicant liable for the amount of tax payable as determined in that order of assessment by reason of the terms of section 44 of the Income-tax Act ?”

The High Court answered the first question in the affirmative and held that the second question did not fall to be determined. In arriving at its conclusion the High Court recorded the following findings :

“(i) On the facts and in the circumstances of this case, the order of assessment made by the Income-tax Officer under section 23 (4) on 30th September, 1953 is bad in law,

(a) absolutely, because he made the assessment of the association and not of those who were members of the association at the time of the dissolution jointly and severally ; and

(b) particularly as against any member on whom notices under sections 34 and 22 (2) were not served because of such failure to serve notices on him.

The assessment is not binding on the petitioner, as no notice under section 22 was issued to him and as he was not assessed severally or jointly with others referred to above.

(ii) The applicant is not liable for the amount of tax payable as determined in the order of assessment dated 30th September, 1953, as that assessment was not made in conformity with section 44 of the Income-tax Act.”

The sole question which fell to be determined before the taxing authorities was whether the order of assessment made by the Income-tax Officer, subsequent to the dissolution of the Group, assessing its income, after serving a notice upon one and not all the members of the Group, could be enforced against members of the Group who were not served. The material part of section 44 of the Indian Income-tax Act (in so far as it dealt with the liability of discontinued associations) before it was amended by section 11 of Finance Act No. XI of 1958 with effect from April 1, 1958, stood as follows:

“Where any business, profession or vocation carried on by a association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a member of such association shall, in respect the income, profits and gains of the association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment.”

The section declares the liability for assessment under Chapter IV of the Act in case of discontinuance of the business of or dissolution of an association. The Group

admittedly discontinued its business at the end of Fasli year 1358 and it was also dissolved. Every person who was at the time of such discontinuance or dissolution a member of the Group was by the express terms of section 44 liable to be assessed jointly and severally in respect of the income, profits and gains of the Group and was also liable for the amount of tax payable. This Court in examining the scheme of section 44 as it stood before its amendment in 1958 in its application to a firm which had discontinued its business observed : *C. A. Abraham, Uppoottil, Kottayam v. The Income-tax Officer, Kottayam and another*¹, at page 770 :

“In effect, the Legislature has enacted by section 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV.”

In *Abraham's case*¹, the Court was concerned with the assessment of a firm of which the business was discontinued because of the dissolution of the firm, by the death of one of the partners. But section 44 as it stands amended by Act VII of 1939 applies to discontinuance of the business of associations of persons as well as of firms, and the question which directly fell to be determined in that case was whether penalty for concealing the particulars of income or for deliberately furnishing inaccurate particulars of income in the return could lawfully be imposed after discontinuance of the business. It is true that the validity of the order assessing the firm was not expressly challenged, though at the date of the order of assessment the firm stood dissolved, and its business was discontinued, but the Court could not adjudicate upon the validity of the order imposing penalty without deciding whether there was a valid assessment, for an order imposing penalty postulates a valid assessment.

Counsel for the respondent contended that even if the assessment after dissolution of the Group be regarded as valid, it is binding upon only those persons who were served with the notice calling for a return, and in support of this plea relied upon the clause

“every person who was at the time of such dissolution, a member of such association shall in respect of the income of the association be jointly and severally liable to assessment”.

He urged that the expression “every person” in section 44 means all persons, and that by enacting that such persons, shall be liable to assessment “jointly and severally” it was intended that after the association is dissolved only the members at the date of dissolution can be assessed in respect of the income of the association. As a corollary to the argument it was submitted that all members who are sought to be assessed must be individually served with notice of assessment, and those not served will not be bound by the assessment.

The argument is plainly inconsistent with what was observed by this Court in *Abraham's case*¹. If by section 44 the continuity of the firm or association is for the purpose of assessment ensured, no question of assessing the individual members of the association can arise. Under Chapter IV of the Income-tax Act an association of persons may be assessed as a unit of assessment, or the individual members may be assessed separately in respect of their respective shares of the income, but the Act contains no machinery for assessing the income received by an association, in the hands of its members collectively. The unit of assessment in respect of the income earned by the association is either the association or each individual member in respect of his share in the income. This is so when the association is existing, and after it is dissolved as well. There can be no partial assessment of the income of an association, limited to the share of the member who is served with notice of assessment. For the purpose of assessment the Income-tax Act invests an association with a personality apart from the members constituting it, and if that personality is, for the purposes of Chapter IV, in so far as it relates to assessment, continued, the theory

of assessment binding only upon members who were served with the notice of assessment can have no validity. This view is supported by the use of the expression "tax payable" in section 44 which in the context in which it occurs can only mean tax which the association, but for dissolution, or discontinuance of its business, would have been assessed to pay. Since the primary purpose of section 44 is to bring, to tax the income of the association after it is dissolved or its business is discontinued, assessment of an aliquot share of that income is not contemplated by section 44 of the Income-tax Act.

The effect of section 44, is as we have stated, merely to ensure continuity in the application of the machinery provided in Chapter IV of the Act for assessment and for imposition of tax liability notwithstanding discontinuance of the business of the association or its dissolution. By virtue of section 44 the personality of the association is continued for the purpose of assessment and Chapter IV applies thereto. What can be assessed is the income of the association received prior to its dissolution, and the members of the association would be jointly and severally assessed thereto in their capacity as members of the association. For the purpose of such assessment, the procedure is that applicable for assessment of the income of the association, as if it had continued. A notice to the appropriate person under section 63 (2) would, therefore, be sufficient to enable the authority to assess to tax the association. The plea that the respondent not having been served personally with the notice of assessment is not liable to pay the tax assessed cannot therefore be sustained.

Counsel for the respondent then contended that the original assessment made under section 23 (4) was invalid, because notice of assessment was not served upon the Group in the manner provided by section 63 (2) of the Indian Income-tax Act, Baba Gowd who was served with the notice not being the principal officer who could be served with notice on behalf of the Group. But no such contention was raised before the Tribunal. It does not arise out of the order of the Tribunal, and the question referred by the Tribunal to the High Court does not justify consideration of that plea. The respondent cannot be permitted to raise a question which did not arise out of the order of the Tribunal, and has not been referred. The case must be decided on the footing that notice of assessment was properly served on Baba Gowd and that the assessment was properly made by the Income-tax Officer under section 23 (4).

We hold that answer to the first question will be in the negative. If the order of assessment is held to be valid, the application made by the respondent for setting aside the assessment on the ground that he was not served with the notice of assessment must fail. The second question will be answered as follows :

"The applicant was liable for the amount of tax payable under the order of assessment".

The appeal is allowed. The respondent will pay the costs of this appeal in this Court and in the High Court.

V.B.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—S. K. DAS, ACTING CHIEF JUSTICE, K. SUBBA RAO. RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDEHOLKAR, JJ.

Guru Gobinda Basu

.. *Appellant **

v.

Sankari Prasad Ghosal and others

.. *Respondents.*

Companies Act (I of 1956), sections 2 (18), 617 and 619—Auditors of company in which 100 percent of the shares are held by Central or State Government—If "holder of an office of profit" under Government—Right to stand as candidate for election to House of the People—Constitution of India (1950), Article 102(1) Applicability—Words and Phrases—"Office of profit."

The provisions of section 619 of the Companies Act make it clear that notwithstanding section 224 of the Act of the appointment of an auditor of a Government company rests solely with the

Central Government as also his removal from office. The powers and duties of an auditor in respect of companies other than Government companies are laid down in section 227, but section 227 does not apply to a Government company as defined in section 2 (18) read with section 617 of the Act.

When 100 per cent of the shares of a company are held by the Union Government or a State Government it is a Government company and an auditor appointed in respect of such a company must be held to be the holder of an office of profit under the Government of India or under a State Government, as the case may be within the meaning of Article 102 (1) (a) of the Constitution of India and therefore disqualified to stand as a candidate for election to the House of the People.

Appeal from the Judgment and Order dated 27th September, 1962 of the Calcutta High Court in Appeal from Original Decree No. 424 of 1962.

S. Chaudhuri, Senior Advocate, (*R. C. Deb* and *S. S. Shukla*, Advocates, with him), for Appellant.

Hari Prossanna Mukherjee, *K. G. Hazra Chaudhuri* and *D. N. Mukherjee*, Advocates for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

S. K. Das, *Acting Chief Justice*.—This is an appeal on a certificate granted by the High Court of Calcutta under Article 133 (1) (c) of the Constitution. No preliminary objection having been taken as to the competency of the certificate, we have heard the appeal on merits.

The short facts giving rise to the appeal are these. The appellant before us is *Guru Gobinda Basu* who is a chartered accountant and a partner of the firm of auditors carrying on business under the name and style of *G. Basu & Company*. The firm acted as the auditor of certain companies and corporations, such as the *Life Insurance Corporation of India*, the *Durgapur Projects Ltd.*, and the *Hindustan Steel, Ltd.*, on payment of certain remuneration. The appellant was also a Director of the *West Bengal Financial Corporation* having been appointed or nominated as such by the State Government of West Bengal. The appointment carried with it the right to receive fees or remuneration as director of the said corporation.

In February-March, 1962 the appellant was elected to the House of the People from Constituency No. 34 (Burdwan Parliamentary Constituency) which is a single member constituency. The election was held in February, 1962. There were two candidates, namely, the appellant and respondent No. 3 to this appeal. The appellant was declared elected on March 1, 1962, he having secured 1,55,495 votes as against his rival who secured 1,23,015 votes. This election was challenged by two voters of the said constituency by means of an election petition dated April 10, 1962. The challenge was founded on two grounds : (1) that the appellant was, at the relevant time, the holder of offices of profit both under the Government of India and Government of West Bengal and this disqualified him from standing in the election under Article 102 (1) (a) of the Constitution ; and (2) that he was guilty of certain corrupt practices which vitiated his election. The second was abandoned at the trial, and we are no longer concerned with it.

The Election Tribunal held that the appellant was a holder of offices of profit both under the Government of India and the Government of West Bengal and was therefore disqualified from standing in the election under Article 102 (1) (a) of the Constitution. The Election Tribunal accordingly allowed the election petition and declared that the election of the appellant to the House of the People was void. There was an appeal to the High Court under section 116-A of the Representation of the People Act, 1951. The High Court dismissed the appeal but granted a certificate of fitness under Article 133 (1) (c) of the Constitution.

The only question before us is whether the appellant was disqualified from being chosen as, and for being, a member of the House of the People under Article 102 (1) (a) of the Constitution. The answer to the question depends on whether the appellant held any offices of profit under the Government of India or the Government of any State other than such offices as had been declared by Parliament by law not to disqualify their holder. It has not been seriously disputed before

us that the office of auditor which the appellant held as partner of the firm of G. Basu & Company was an office of profit. It has not been contended by the appellant before us that the office of profit which he held had been declared by Parliament by law not to disqualify the holder. Therefore the arguments before us have proceeded entirely on the question as to the true scope and meaning of the expression "under the Government of India or the Government of any State" occurring in clause (a) of Article 102 (1) of the Constitution. The contention on behalf of the appellant has been that on a true construction of the aforesaid expression, the appellant cannot be said to hold an office of profit under the Government of India or the Government of West Bengal. On behalf of the respondents the contention is that the office of auditor which the appellant holds is an office of profit under the Government of India in respect of the Life Insurance Corporation of India, the Durgapur Projects Ltd, and the Hindustan Steel Ltd., and in respect of the West Bengal Financial Corporation of which the appellant is a Director appointed by the Government of West Bengal, he holds an office of profit under the Government of West Bengal. These are the respective contentions which fall for consideration in the present appeal.

It is necessary to state here that if in respect of any of the four companies or corporations it be held that the appellant holds an office of profit under the Government, be it under the Government of India or the Government of West Bengal, then the appeal must be dismissed. It would be unnecessary then to consider whether the office of profit which the appellant holds in respect of the other companies is an office of profit under the Government or not. We would therefore take up first the two companies, namely, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., which are 100 per cent Government companies and consider the respective contentions of the parties before us in respect of the office of auditor which the appellant holds in these two companies. If we hold that in respect of any of these two companies the appellant holds an office of profit under the Government of India then it would be unnecessary to consider the position of the appellant in any of the other companies.

It is not disputed that the Hindustan Steel, Ltd., and the Durgapur Projects, Ltd. are Government companies within the meaning of section 2 (18) read with section 617 of the Indian Companies Act, 1956. It has been stated before us that 100 per cent. of the shares of the Durgapur Projects, Ltd., are held by the Government of West Bengal and 100 per cent. of the shares of the Hindustan Steel, Ltd. are held by the Union Government. We may now read section 619 of the Indian Companies Act, 1956.

"(1) In the case of a Government company, the following provisions shall apply notwithstanding anything contained in sections 224 to 233.

(2) The auditor of a Government company shall be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India shall have power,

(a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instructions in regard to any matters relating to the performance of his functions as such ;

(b) to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf, and for the purposes of such audit, to require information or additional information to be furnished to any person or persons so authorised, on such matters by such person or persons, and in such form, as the Comptroller and Auditor-General may, by general or special order, direct.

(4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit.

(5) Any such comments upon, or supplement to, the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report."

It is clear from the aforesaid provisions that notwithstanding section 224 of the Act which empowers every company to appoint an auditor or auditors at each annual general meeting, the appointment of an auditor of a Government company rests,

solely with the Central Government and in making such appointment the Central Government takes the advice of the Comptroller and Auditor-General of India. Under section 224 (7) of the Act an auditor appointed under section 224 may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf. The remuneration of the auditors of a company is to be fixed in accordance with the provisions of sub-section (8) of section 224. It is clear however that sub-section (7) of section 224 does not apply to a Government company because the auditor of a Government company is not appointed under section 224 of the Act, but is appointed under sub-section (2) of section 619 of the Act. It is clear therefore that the appointment of an auditor in a Government company rests solely with the Central Government and so also his removal from office. Under sub-section (3) of section 619 the Comptroller and Auditor-General of India exercises control over the auditor of a Government company in respect of various matters including the manner in which the company's accounts shall be audited. The Auditor-General has also the right to give such auditor instructions in regard to any matter relating to the performance of his functions as such. The Auditor-General may conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf. In other words, the Comptroller and Auditor-General of India exercises full control over the auditors of a Government company. The powers and duties of auditors in respect of companies other than Government companies are laid down in section 227 of the Act but by virtue of sub-section (1) of section 619 of the Act, the provisions in section 227 of the Act, do not apply to a Government company because a Government company is subject to the provisions of section 619 of the Act. Under section 619-A of the Act, where the Central Government is a member of a Government company, an annual report of the working and affairs of the company has to be prepared and laid before both Houses of Parliament with a copy of the audit report and the comments made by the Comptroller and Auditor-General. Under section 620 of the Act the Central Government may by notification direct that any of the provisions of the Act, other than sections 618, 619 and 639, shall not apply to any Government company.

The net result of the aforesaid provisions is that so far as the Durgapur Projects, Ltd., and the Hindustan Steel Ltd., are concerned, the appellant was appointed an auditor by the Central Government; he is removable by the Central Government and the Comptroller and Auditor-General of India exercises full control over him. His remuneration is fixed by the Central Government under sub-section (8) of section 224 of the Act though it is paid by the company.

In these circumstances the question is, does the appellant hold an office of profit under the Central Government? We may now read Article 102 (1) of the Constitution.

“102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b)	*	*	*	*	*	*
(c)	*	*	*	*	*	*
(d)	*	*	*	*	*	*
(e)	*	*	*	*	*	*

We have stated earlier that the sole question before us is whether the office of profit which the appellant undoubtedly holds as auditor of the Durgapur Projects Ltd., and the Hindustan Steel, Ltd., is or is not under the Government of India. According to Mr. Chaudhuri who has argued the appeal on behalf of the appellant, the expression “under the Government” occurring in Article 102 (1) (a) implies subordination to Government. His argument is that ordinarily there are five tests of such subordination, namely, (1) whether Government makes the appointment to the office; (2) whether Government has the right to remove or dismiss the holder of office; (3) whether Government pays the remuneration; (4) what are the func-

tions which the holder of the office performs and does he perform them for Government ; and (5) does Government exercise any control over the performance of those functions. His argument further is that the tests must all co-exist and each must show subordination to Government so that the fulfilment of only some of the tests is not enough to bring the holder of the office under the Government. According to him all the tests must be fulfilled before it can be said that the holder of the office is under the Government. His contention is that the Election Tribunal and the High Court were in error in holding that the appellant was a holder of office under the Government, because they misconstrued the scope and effect of the expression "under the Government" in Article 102 (1) (a) of the Constitution. He has contended that tests (3), (4) and (5) adverted to above are not fulfilled in the present case. The appellant gets his remuneration from the company though fixed by Government ; he performs functions for the company and he is controlled by the Comptroller and Auditor-General who is different from the Government.

On behalf of the respondents it is argued that the tests are not cumulative in the sense contended for by the appellant, and what has to be considered is the substance of the matter which must be determined by a consideration of all the factors present in a case, and whether stress will be laid on one factor or the other will depend on the circumstances of each particular case. According to the respondents, the tests of appointment and dismissal are important tests in the present case, and in the matter of a company which is a 100 per cent. Government company, the payment of remuneration fixed by Government, the performance of the functions for the company and the exercise of control by the Comptroller and Auditor-General, looked at from the point of view of substance and taken in conjunction with the power of appointment and dismissal, really bring the holder of the office under the Government which appoints him.

One point may be cleared up at this stage. On behalf of the respondents no question has been raised that the Durgapur Projects, Ltd. or the Hindustan Steel, Ltd., is a department of Government or an emanation of Government—a question which was considered at some length in *Narayanaswamy v. Krishnamurthi*¹. Learned Counsel for the respondents has been content to argue before us on the basis that the two companies having been incorporated under the Indian Companies Act, 1956 are separate legal entities distinct from Government. Even on that footing he has contended that in view of the provisions of section 619 and other provisions of the Indian Companies Act, 1956, an auditor appointed by the Central Government and liable to be removed from office by the same Government, is a holder of an office of profit under the Government in respect of a company which is really a 100 per cent. Government company.

We think that this contention is correct. We agree with the High Court that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and 'the holder of a post or service under the Government' : see Articles 309 and 314. The Constitution has also made a distinction between 'the holder of an office of profit under the Government' and 'the holder of an office of profit under a local or other authority subject to the control of Government' ; see Articles 58 (2) and 66 (4). In *Maulana Abdul Shakur v. Rikhab Chand and another*², the appellant was the manager of a school run by a committee of management formed under the provisions of the Durgah Khwaja Saheb Act, 1955. He was appointed by the administrator of the Durgah and was paid Rs. 100 per month. The question arose whether he was disqualified to be chosen as a member of Parliament in view of Article 102 (1) (a) of the Constitution. It was contended for the respondent in that case that under sections 5 and 9 of the Durgah Khwaja Saheb Act, 1955 the Government of India had the power of appointment and removal of members of the committee of management as also the power to appoint the administrator in

1. I.L.R. 1958 Mad. 513 : (1958) 1 M.L.J. 367. 88 : (1958) 1 An.W.R. (S.C.) 88 : (1958) S.C.R. 2. (1958) S.C.J. 329 : (1958) 1 M.L.J. (S.C.) 387.

consultation with the committee ; therefore the appellant was under the control and supervision of the Government and that therefore he was holding an office of profit under the Government of India. This contention was repelled and this Court pointed out the distinction between ' the holder of an office of profit under the Government ' and ' the holder of an office of profit under some other authority subject to the control of Government '. Mr. Chaudhuri has contended before us that the decision is in his favour. He has argued that the appellant in the present case holds an office of profit under the Durgapur Projects, Ltd., and the Hindustan Steel Ltd., which are incorporated under the Indian Companies Act ; the fact that the Comptroller and Auditor-General or even the Government of India exercises some control does not make the appellant any the less a holder of office under the two companies. We do not think that this line of argument is correct. It has to be noted that in *Maulana Abdul Shakur's case*¹, the appointment of the appellant of that case was not made by the Government nor was he liable to be dismissed by the Government. The appointment was made by the administrator of a committee and he was liable to be dismissed by the same body. In these circumstances this Court observed :

" No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee are removable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test."

It is clear from the aforesaid observations that in *Maulana Abdul Shakur's case*¹, the factors which were held to be decisive were (a) the power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion, and (b) payment from out of Government revenues, though it was pointed out that payment from a source other than Government revenues was not always a decisive factor. In the case before us the appointment of the appellant as also his continuance in office rests solely with the Government of India in respect of the two companies. His remuneration is also fixed by Government. We assume for the purpose of this appeal that the two companies are statutory bodies distinct from Government but we must remember at the same time that they are Government companies within the meaning of the Indian Companies Act, 1956 and 100 per cent. of the shares are held by the Government. We must also remember that in the performance of his functions the appellant is controlled by the Comptroller and Auditor-General who himself is undoubtedly holder of an office of profit under the Government, though there are safeguards in the Constitution as to his tenure of office and removability therefrom. Under Article 148 of the Constitution the Comptroller and Auditor-General of India is appointed by the President and he can be removed from office in like manner and on the like grounds as a Judge of the Supreme Court. The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and until they are so determined shall be as specified in the Second Schedule to the Constitution. Under clause (4) of Article 148 the Comptroller and Auditor-General is not eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office. Clause (5) of the said Article lays down that subject to the provisions of the Constitution and of any law made by Parliament, the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General. Under Article 149 of the Constitution the Comptroller and Auditor-General shall

1. (1958) S.C.J. 329; (1958) 1 M.L.J. (S.C.) S.C.R. 387.
88 : (1958) 1 An. W.R. (S.C.) 88 : (1958)

perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of the Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively. The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union have to be submitted to the President and the reports of the Comptroller and Auditor-General relating to the accounts of a State have to be submitted to the Governor. From the aforesaid provisions it appears to us that the Comptroller and Auditor-General is himself a holder of an office of profit under the Government of India, being appointed by the President and his administrative powers are such as may be prescribed by rules made by the President, subject to the provisions of the Constitution and of any law made by Parliament. Therefore if we look at the matter from the point of view of substance rather than of form, it appears to us that the appellant as the holder of an office of profit in the two Government companies, the Durgapur Projects, Ltd., and the Hindustan Steel, Ltd., is really under the Government of India; he is appointed by the Government of India, he is removable from office by the Government of India; he performs functions for two Government companies under the control of the Comptroller and Auditor-General who himself is appointed by the President and whose administrative powers may be controlled by rules made by the President.

In *Ramappa v. Sangappa*¹, the question arose as to whether the holder of a village office who has a hereditary right to it is disqualified under Article 191 of the Constitution, which is the counter-part of Article 102, in the matter of membership of the State Legislature. It was observed therein :

“The Government makes the appointment to the office though it may be that it has under the statute no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The office is therefore, held by reason of the appointment by the Government and not simply because of a hereditary right to it. The fact that the Government cannot refuse to make the appointment does not alter the situation.”

There again the decisive test was held to be the test of appointment. In view of the decisions we cannot accede to the submission of Mr. Chaudhuri that the several factors which enter into the determination of this question—the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf—must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office *under* the Government, Central or State, is not satisfied. The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor—not decisive of the question. As we have said earlier whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office *under* the authority so empowered.

For the reasons given above we have come to the conclusion that the Election Tribunal and the High Court were right in coming to the conclusion that the appellant as an auditor of the two Government companies held an office of profit under the Government of India within the meaning of Article 102 (1) (a) of the Constitution. As such he was disqualified for being chosen as, and for being, a

1. (1959) S.C.J. 167 : (1959) S.C.R. 1167.

member of either House of Parliament. It is unnecessary to consider the further question whether he was a holder of an office of profit either under the Government of India or the Government of West Bengal by reason of being an auditor for the Life Insurance Corporation of India or a Director of the West Bengal Financial Corporation.

The appeal accordingly fails and is dismissed with costs.

P.R.N.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J.C. SHAH, JJ.

Vijai Pratap Singh and another

.. *Appellants**

vs.

Dukh Haran Nath Singh and another

.. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, Rule 5 (d)—Scope of the enquiry under—Application to sue as pauper—Transposition of parties—If permissible—Order 1, Rule 10—Applicability.

By the express terms of Order 33, rule 5, clause (d), Civil Procedure Code, the Court is concerned to ascertain whether the allegations made in the petition show a cause of action. The Court has not to see whether the claim made by the petitioner is likely to succeed ; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the Court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits ; nor is the Court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the Statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown ; the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit.

An application to sue *in forma pauperis*, is but a method prescribed by the Code for institution of a suit by a pauper without payment of fee prescribed by the Court fees Act. If the claim made by the applicant that he is a pauper is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue *in forma pauperis* as required by Order 33, of the Code of Civil Procedure is presented, and Order 1 rule 10 of the Code of Civil Procedure would be as much applicable in such a suit as in a suit in which Court fee had been duly paid. It is true that a person who claims to join a petitioner praying for leave to sue *in forma pauperis* must himself be a pauper. But his claim to join by transposition as an applicant must be investigated : it is not liable to be rejected on the ground that the claim made by the original applicant is personal to himself.

Appeals by Special Leave from the judgment and Order dated the 2nd May, 1955, of the Allahabad High Court in Civil Revision Nos. 881 and 882 of 1952.

S.N. Andley, Rameshwar Nath and P.L. Vohra, Advocates of *M/s. Rajinder Narain & Co.* for Appellant (in C.A. No. 253 of 1961) and Respondent No. 2 (in C.A. No. 254 of 1961).

S.P. Varma, Advocate, for Appellant (in C.A. No. 254 of 1961) and Respondent No. 2 (in C.A. No. 254 of 1961).

C. B. Agarwala, Senior Advocate (*C. P. Lal*, Advocate, with him), for Respondent No. 1 (in both Appeals).

The Judgment of the Court was delivered by

Shah, J.—Vijai Pratap Singh (hereinafter called the plaintiff)—a minor—by his next friend Pandit Brij Mohan Misir filed a petition in the Court of the Subordinate Judge, Faizabad, for leave to sue *in forma pauperis* for declaration of title to the Ajodhya Raj and accretions thereto and for possession and mesne profits for three years prior to the suit. The petition was rejected by the Subordinate Judge because, in his view, it disclosed no cause of action. An application by

Ramjiwan Misir—father of the plaintiff—who was impleaded as the second defendant, to be transposed as a petitioner was also rejected by the Subordinate Judge. The plaintiff and Ramjiwan Misir applied to the High Court of Judicature at Allahabad in the exercise of its revisional jurisdiction against the orders rejecting their respective petitions but without success. They have with Special Leave appealed to this Court against the orders passed by the High Court.

The case set up by the plaintiff in his petition was briefly this. Maharaja Sir Man Singh, holder of the Ajodhya Raj was a Taluqdar in lists I, II and V of the Oudh Estates Act I of 1869. He died in 1870 and the Raj devolved upon his daughter's son Maharaja Pratap Narain Singh who died on 9th November, 1906 leaving him surviving two widows—Suraj Kumari and Jagdamba Devi—and no lineal descendant. A will alleged to be executed by Maharaja Pratap Narain Singh on 20th July, 1891 was set up but it was void and ineffective because, firstly, it was procured by undue influence, coercion and fraud practised upon the testator, and secondly, it created a line of succession contrary to law. Accordingly on the death of Maharaja Pratap Narain Singh the Raj devolved upon Maharani Suraj Kumari—the senior widow—and on her death in 1927 upon Maharani Jagdamba Devi, and on the death of the latter on 18th June, 1928 upon Ganga Dutt Misir, grandfather of the plaintiff. Ganga Dutt Misir died in 1942 and the estate devolved upon his son Ramjiwan and his grandson, the plaintiff as coparceners in a Hindu joint family. Even if the will was valid and effective “the terms thereof along with Maharaja Pratap Singh's other acts and declarations had the effect of taking the estate out of the purview of Act I of 1869 with the result that Maharani Jagdamba Devi enjoyed the property in suit with a life estate therein, and on her death on 18th June, 1938 the entire property in suit vested in Ganga Dutt on whose death the plaintiff and defendant No. 2 became owners of the entire property in suit as their joint ancestral property”. Defendant No. 1—Dukh Haran Singh—claimed to be adopted as a son by Jagadamba Devi on 12th February, 1909 but the claim was “utterly false, fictitious and untrue” for the reasons set out in the partition, and the Raj was in the wrongful possession of the first defendant—Dukh Haran Singh.

The plaintiff alleged that his father Ramjiwan Misir was “detained and confined” by the first defendant and was unable to join the plaintiff in the petition.

The first defendant Dukh Haran Singh resisted the petition *inter alia* contending that it did not disclose a cause of action and that, in any event, the claim made by the plaintiff was barred by the law of limitation.

Initially Ram Jiwan Misir supported the will and the plea of adoption set up by the first defendant, but by an application dated 21st April, 1951 prayed that he be transposed as a petitioner submitting that his previous statement was procured by coercion and contained averments which were untrue. Ramjiwan was directed to pay the Court-fee payable on the plaint within ten days and in default of payment, his application was to stand dismissed. Ramjiwan did not pay the Court-fee as directed but on 23rd July, 1951, he again applied for being transposed as a petitioner in the petition for leave to sue *in forma pauperis* filed by the plaintiff. Holding that it did not disclose a cause of action the Subordinate Judge rejected the petition of the plaintiff. The Subordinate Judge observed that there was nothing in the petition to show how the disputed estate came to be governed by the rule of inheritance under the Hindu Law and, in any event, there was nothing in the petition to support the plea that the estate had lost its impartible character, and that even if in view of the allegations contained in para 12 of the petition it be held that the estate came to be governed by the ordinary Hindu Law, it did not become a partible estate which the plaintiff could inherit, so long as his father Ramjiwan was alive. The petition filed by Ramjiwan Misir was then taken up for hearing and was also rejected because, in the view of the learned Judge, “no useful purpose would be served” by transposing Ram Jiwan Misir as co-plaintiff when the application filed by the plaintiff was held to be defective and liable to be rejected under Order 33, rule 5 (d) of the Code of Civil Procedure.

Against the two orders passed by the Subordinate Judge the plaintiff preferred Revision Application No. 881 of 1952 and Ram Jiwan preferred Revision Petition 882 of 1952. The High Court rejected the petition of the plaintiff holding that on the death of Ganga Dutt in 1942 the estate would devolve upon Ram Jiwan Misir alone according to the rule of impartibility which governed the devolution of the estate. The High Court also observed that there was nothing in the petition to show that Ganga Dutt succeeded to the estate "on the basis of his being the nearest male reversioner under the Ordinary Hindu Law", and that it was unnecessary to consider whether the will by Maharaja Pratap Narain took out the estate from the operation of the Act, "because the plaintiff did not rely upon the will and whatever the plaintiff had stated in the petition in connection with the will was simply by way of answer to what might be contended by the defendant in the suit." Dealing with the petition of Ram Jiwan Misir the High Court observed that :

"By an application to sue *in forma pauperis* the applicant prays for a relief personal to himself and therefore nobody else can be properly made a co-applicant. There is no direct provision which provides that a Court should transpose a party from one side to the other. Order 1, rule 10, gives the power to the Court to strike out or add the names of parties when it appears that he has been improperly joined or that he ought to have been joined or his presence before the Court would be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit. The provisions of this rule will not apply to the proceedings on an application for permission to sue as a pauper."

We are unable to agree with the view of the High Court that the petition filed by the plaintiff did not disclose a cause of action, or that Order 1, rule 10 of the Code of Civil Procedure cannot properly be resorted to for transposing a party in a petition for leave to sue *in forma pauperis*. The plaintiff had by his plaint set up an alternative case. In the first instance, he pleaded that the will alleged to be executed by Maharaja Pratap Narain on 20th July, 1891, was "void and ineffective" and the estate devolved upon Ram Jiwan and the plaintiff as members of a coparcenary : alternatively, he pleaded that even if the will was valid, by the terms thereof and by the other acts and declarations of Maharaja Pratap Narain Singh, the estate was taken out "of the purview of Act I of 1869" and on the death of Maharani Jagadamba Devi the property devolved upon Ganga Dutt, the nearest reversioner under the Hindu law and on his death it devolved upon the plaintiff and upon his father Ram Jiwan Misir.

Order 33 of the Code of Civil Procedure prescribes the procedure for institution of suits by paupers. Rule 2 provides what particulars a petition for permission to sue *in forma pauperis* shall contain and rule 3 sets out the mode of presentation of the petition. Rule 4 authorises the Court to examine the applicant or his agent regarding the merits of the case and the property of the applicant. Rule 5 provides :

"The Court shall reject an application for permission to sue as a pauper—

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter."

Where the application is not rejected on the grounds set out in rule 5, the Court has under rule 6, to proceed, after giving notice to the opposite party and the Government Pleader, to receive such evidence as the applicant may adduce in proof of his pauperism. By rule 7 the Court is authorised to consider whether the applicant is not subject to any of the prohibitions specified in rule 5. The Court is enjoined to reject a petition where the prohibitions mentioned in clauses (a) to (e) of rule 5

exist. Even if the petition is not so rejected at the hearing of the petition, if the Court is satisfied as to the existence of these prohibitions it may be dismissed under rule 7.

It does not appear that any objection was raised as to the existence of prohibitions (c) and (d) set out in rule 5, and the Subordinate Judge disallowed the objection that the petition was not framed and presented as prescribed by rules 2 and 3. He did not consider the question whether the plaintiff was a pauper. He rejected the application only on the ground that it did not show a cause of action, and the High Court confirmed the order also on that ground. By the express terms of rule 5, clause (e) the Court is concerned to ascertain whether the allegations made in the petition show a cause of action. The Court has not to see whether the claim made by the petitioner is likely to succeed : it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the Court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the permits ; nor is the Court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, *prima facie*, show a cause of action, the Court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claim made by him. By the Statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown : the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit.

We do not propose to express any opinion on the question whether on the death of Jagdamba Devi the estate devolved under section 22 (10) of Act I of 1869 upon Ramjiwan Misir and the plaintiff as members of a coparcenary. Even if that claim is inconsistent with the words of section 22 (10) of Act I of 1869 on which the plaintiff himself relies, the plaintiff had an alternative claim that the estate had become non-taluqdari by virtue of the will and "the acts and declarations" of Maharaja Pratap Narain. In support of this claim, section 15 of Act I of 1869, before it was amended by U.P. Act III of 1910 is relied upon. At the time when Maharaja Pratap Narain died, section 15 of the Act stood as follows :—

"If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee or his heir or legatee shall hereafter transfer or bequeath, to any person not being a taluqdar or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of and succession to such property if the transferee or legatee had bought the same from a person not being a taluqdar or grantee."

It is true that by section 8 of Act III of 1910, the section has been substantially modified and reads as follows :—

"If any taluqdar or grantee, or his heir or legatee, shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath the whole or any portion of his estate to any person who did not at the time when the transfer or bequest took effect belong to any of the classes specified in section 14, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of and succession to such property if the transferee or legatee had bought the same from a person not being a taluqdar or grantee, heir or legatee."

By section 21 of the Amending Act III of 1910 a partial retrospective operation was given to the amended section. The retrospective operation was limited by the Proviso which enacted that nothing contained in the amending section shall affect suits pending at the commencement of the Amending Act, or shall be deemed to vest in or confer upon any person any right or title to any estate, or any portion thereof, or any interest therein, which is, at the commencement of the Amending Act, vested in any other person who would have been entitled to retain the same if

the Amending Act had not been passed, and the right or title of such other person shall not be affected by anything contained in the said section.

Mr. Agarwalla, appearing on behalf of the first defendant Dukh Haran Singh, has contended that in view of the retrospective operation given to section 15, as amended, the claim of the plaintiff that the taluqdari character of the estate is destroyed has no force and he has invited our attention to two decisions of the Oudh Chief Court in *Kaur Nageshar Sahai v. Shiam Bahadur and others*¹, and *Mohammad Ali Khan v. Nisar Ali Khan*². But we need express no opinion on the correctness or otherwise of these decisions. An enquiry whether by virtue of certain provisions of the statute on which the first defendant relies, the plaintiff may not be entitled to the estate is, as already observed, not contemplated to be made in considering a petition for leave to sue *in forma pauperis*. The true effect of the amended section 15 of the Oudh Estates Act, I of 1869, is a complicated question of law which the Court will not proceed to determine in ascertaining whether the petition for leave to sue discloses a cause of action.

The High Court, in our judgment, was in error in observing that there was nothing in the plaint to show that Ganga Dutt succeeded to the estate because he was the nearest male reversioner under the ordinary Hindu Law. The plaintiff has emphatically made that assertion: whether the claim to relief on the basis of that assertion was justified must be adjudicated at the trial of the suit, and not in deciding whether the plaintiff should be permitted to sue *in forma pauperis*.

We are also of the view that the High Court was in error in holding that by an application to sue *in forma pauperis*, the applicant prays for relief personal to himself. An application to sue *in forma pauperis*, is but a method prescribed by the Code for institution of a suit by a pauper without payment of fee prescribed by the Court-fees Act. If the claim made by the applicant that he is a pauper is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue *in forma pauperis* as required by Order 33 of the Code of Civil Procedure is presented, and Order 1, rule 10 of the Code of Civil Procedure would be as much applicable in such a suit as in a suit in which Court-fee had been duly paid. It is true that a person who claims to join a petitioner praying for leave to sue *in forma pauperis* must himself be a pauper. But his claim to join by transposition as an applicant must be investigated; it is not liable to be rejected on the ground that the claim made by the original applicant is personal to himself. In our view, the orders passed by the High Court in both the revision applications must be set aside.

Before parting with the case, we must take notice of the unsatisfactory progress this litigation has made since it was instituted nearly twelve years ago. We regret to observe that the petition filed in July 1950 for leave to sue *in forma pauperis* was not disposed of by the Subordinate Judge for two years and it took the High Court three years to dispose of the Revision Petitions against the order of the Subordinate Judge. The proceedings were further held up even after Special Leave was granted by this Court in March, 1957, for nearly five years before the appeal could be heard. This Court had ordered that the hearing of the appeals be expedited and heard on cyclostyled record but the record was not made ready for a long time. We also find that a large number of documents were included in the books prepared for use of the Court to which no reference was made at the Bar during the course of the hearing. We trust that the case will be taken up for hearing with the least practicable delay and disposed of according to law.

The appellants in the two appeals will be entitled to their costs both in this Court and the High Court. The costs of the trial Court will be the cost in the cause.

V.S.

Appeals allowed.

1. A.I.R. 1922 Oudh 231.

2. A.I.R. 1928 Oudh 67.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Messrs. Soorajmull Nagarmull

.. Appellant*

v.

The Commissioner of Income-tax (Central), Calcutta, etc. .. Respondent.

Constitution of India (1950), Article 136—Appeal by Special Leave against order of Income-tax Tribunal after dismissal of application to High Court for order requiring the Tribunal to state a case—Re-appraisal of evidence—Powers.

In appeals by Special Leave against the order of the Income-tax Tribunal after applications to the High Court for orders requiring the Tribunal to state a case under section 66 (2) of the Income-tax Act were dismissed, the Supreme Court would not ordinarily enter upon a re-appraisal of evidence on which the order of the Court or Tribunal if founded. It makes no difference whether an appeal is filed also against the order of the High Court refusing to call for a statement of the case. The Legislature has expressly entrusted the power of appraisal of evidence to the Taxing Authorities, and the decision of those authorities would ordinarily be regarded as final. This is not to say that in a proper case the Supreme Court may not, in the interest of justice when occasion demands it review the evidence. The power of the Supreme Court under Article 136 of the Constitution is not restricted; but it is only in very exceptional cases that the Court enters upon appraisal of evidence in appeals filed with Special Leave.

[In the instant case there were no such exceptional circumstances.]

Appeals by Special Leave from the Judgment and Order dated the 20th March, 1957, of the Income-tax Appellate Tribunal (Calcutta Bench) in I.T.A. Nos. 7225 and 7341 of 1954-55.

R. J. Kolah, D. H. Dwarkadas and B. P. Maheshwari, Advocates, for Appellant (In C.A. No. 238 of 1961) and Respondent (In C.A. No. 239 of 1961).

K. N. Rajagopal Sastri, Senior Advocate, (D. Gupta, Advocate, with him), for Respondent (In C.A. No. 238 of 1961) and Appellant (In C.A. No. 239 of 1961).

The Judgment of the Court was delivered by

Shah, J.—The assessee and the Commissioner have preferred appeals against the order of the Tribunal passed under section 33 (4) of the Indian Income-tax Act, after their applications to the High Court of Calcutta for orders requiring the Tribunal to state a case under section 66 (2) were dismissed.

Counsel for the assessee contends that even if his appeal against the order of the High Court under section 66 (2) fails on the merits, this Court has power to consider their appeal against the order of the Tribunal. This Court in *Chandi Prasad Chhokhani v. The State of Bihar*¹, in dealing with cases where against the order passed by a Tax Tribunal, without appealing against the order of the High Court refusing to call for the statement of the case set out the practice as follows :

“(a) Where the aggrieved party approaches the High Court under a taxing Statute for an order calling for a statement of the case and the High Court rejects the application, this Court in exercise of its powers under Article 136 will not ordinarily allow the order of the High Court to be by passed by entertaining an appeal directly against the order of the Tribunal. Such exercise of power would be particularly inadvisable where the result may be conflict of decisions of two Courts of competent jurisdiction. The scheme of the taxing statutes is to avoid such a conflict by making the decision of the taxing authorities on questions of fact final subject to appeal, revision or review as provided by the statutes and the decision of the High Court subject to appeal to this Court final on questions of law.

(b) This rule does not bar the Court granting Special Leave where circumstances are exceptional, such as, in *Dhakeswari Cotton Mills, Ltd. v. Commissioner of Income-tax, West Bengal*², where the Tribunal had violated fundamental rules of justice or as in *Baldev Singh's Case*³, where on account of special circumstances over which the aggrieved party has no control the High Court was unable to consider the application for calling for a statement of the case on the merits, and the right of the party to approach the High Court was thereby lost.

Counsel for the assessee contended that in *Chhokhani's case*,¹ no appeal at all was filed by the assessee against the order of the High Court and the principle of

* C. As. Nos. 238 and 239 of 1961.

19th February, 1962.

1. (1962) 1 S.C.J. 138 : (1962) 2 S.C.R. 276 : 122 : (1955) 1 S.C.R. 941.
43 I.T.R. 498.

2. (1955) 1 M.L.J. (S.C.) 60 : (1955) S.C.J.

3. (1961) 1 S.C.J. 512 : (1961) 1 S.C.R. 482.

that case is inapplicable in a case where the aggrieved party has appealed against the order of the High Court as well as against the order of the Tribunal. It is true that in the case before us appeals have been filed against the order of the Tribunal deciding the appeal under section 33 (4) of the Indian Income-tax Act as well as the order of the High Court under section 66 (2) refusing to require the Tribunal to state a case ; but we fail to see any distinction in principle between a case in which in appealing against the order of the Tribunal no appeal is filed against the order of the High Court, and a case in which an appeal is filed against the order of the Tribunal as well as against the order of the High Court and the latter appeal is dismissed because it has no merit.

Counsel has not invited our attention to any special or exceptional circumstances in this case. We have heard elaborate arguments on behalf of the assessee and the Commissioner on their respective contentions and for reasons already set out are of opinion that no case is made out for calling for a statement of the case from the Tribunal. If we proceed to hear the appeal against the order of the Tribunal after upholding the order of the High Court that no question of law arose out of the order of the Tribunal, it would be a departure from the well-settled rule that we ordinarily do not in exercise of our jurisdiction under Article 136, enter upon a re-appraisal of the evidence on which the order of the Court or Tribunal is founded. The Legislature has expressly entrusted the power of appraisal of evidence to the Taxing Authorities, and the decision of those authorities would ordinarily be regarded as final. This is not to say that in a proper case this Court may not, in the interest of justice when occasion demands it, review the evidence. The power of this Court under Article 136 is not restricted ; but it is only in very exceptional cases that this Court enters upon appraisal of evidence in appeals filed with Special Leave and this case does not disclose any such exceptional circumstances.

On this ground the Appeals Nos. 238 and 239 of 1961 filed by the assessee and the Commissioner against the order of the Tribunal must fail and are dismissed with costs. One hearing fee.

K.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.
Life Insurance Corporation of India and others

∴ *Appellants**

v.

Sunil Kumar Mukherjee and others

∴ *Respondents.*

Life Insurance Corporation Act (XXXI of 1956), (as amended in 1957), sections 11 (1) and (2) and 49—Scope and effect of—Power of Corporation to frame Regulations in respect of Field Officers—Life Insurance Corporation Field Officers (Alteration of Remuneration and other Term and Conditions of Service) Order 1957, Clause 10 (a) and (b)—Scope—Non-compliance—Effect on validity of order of termination of service of officer—Life Insurance Corporation (Staff) Regulations (1958), clause 5 of paragraph 4 (h) of the order of Managing Director, L.I.C. dated 2nd February, 1957—Scope.

The scheme of section 11 (1) of the Life Insurance Corporation Act is that with the transfer of the controlled business from the insurer to the Corporation, the employees of the former became the employees of the latter, but they were governed by the same terms and conditions until altered by the latter. Under section 11 (2) of the Act as modified in 1957 the Central Government is given the power to alter (whether by way of reduction or otherwise) the remuneration and the other terms and conditions of service to such extent and in such manner as it thinks fit. If the alteration made by the Central Government is not acceptable to them, they are entitled to leave the employment of the Corporation on payment of compensation as provided by section 11 (2).

The Life Insurance Corporation Field Officers (Alteration of Remuneration and other Terms and Conditions of Service) Order, 1957, issued by the Central Government on 30th December, 1957 in exercise of the powers conferred on it by section 11 (2) of the Act was confined in its operation to the officers of the Insurers known as "Field Officers" (subsequently changed into "Development Officers"

* (C.As. Nos. 909 to 923 of 1963).

in 1962) and was intended to prescribe the terms and conditions of service of Development Officers who had become employees of the Corporation under section 11 (1) of the Act. If any action is intended to be taken in respect of such officers for termination of their services, it must be taken under Clause 10 (a) or 10 (b); but in either case an opportunity of showing cause against the order proposed to be taken must be given to the officer concerned and an inquiry has to be held.

The Regulations framed by the Corporation under section 49 of the Act read with clause 11 of the Order, which partake of the character of Rules framed under section 48 of the Act must be consistent with the Act, and if they are found to be inconsistent either with section 11 (2) of the Act or with the order of the Central Government under section 11 (2), they must be held to be invalid. Therefore any order issued by the Corporation terminating the services of any Development Officer which does not conform to and is not in accordance with either clause 10 (a) or 10 (b) of the Order must be held to be invalid. Although the order of termination purports to be made under the circulars issued by the Managing Director of the Life Insurance Corporation on 30th September, 1957, and 2nd December, 1957, and made a part of the Regulations by treating them as Annexures to the Regulations, these circulars are without any authority in law and therefore the orders of termination of services cannot be sustained under these circulars.

It has also to be noted that what the Regulation authorised the Corporation to do in respect of the Field Officers was merely to determine his salary in the category of such officers. It would not be open to the Corporation to require an officer to accept an assignment in a lower or different category. An order of termination of services because an officer refused to take an assignment in a lower or different category cannot be justified and must be held invalid.

Appeal from the Judgment and Orders dated 26th July and 1st August, 1962, of the Calcutta High Court in Appeals from Original Orders Nos. 288 and 274 to 276, 278, 280, 279, 281, 273, 272, 271, 270, 269, 282 and 292 of 1961.

H.N. Sanyal, Solicitor-General of India, (*S.J. Banaji*, *Prasanta Kumar Ghose* and *K.L. Hathi*, Advocates with him), for Appellants (In all the appeals).

B. Sen, Senior Advocate (*Salil Kumar Datta* and *Sukumar Ghose*, Advocates, with him, for Respondents Nos. 1 to 15 (In all the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is a group of 15 appeals which raise a common question about the validity of the orders passed by the appellant Life Insurance Corporation of India terminating the services of its employees who are the respondents in these appeals. The facts which give rise to the present disputes between the parties in all the 15 cases are substantially similar, and so, it would be enough if we state the relevant facts in one of these cases. One of the respondents is Sunil Kumar Mukherjee. He was in the insurance line since June, 1941 and had been confirmed in his service by the Metropolitan Insurance Co., Ltd., in March, 1950. Since about 1953, he had been working as Inspector of the said Company, and since 18th March, 1955, he was holding the appointment as Inspector at Barrackpore. The appellant which took over the controlled business of the Metropolitan Insurance Co., Ltd., terminated the services of Mukherjee by an order passed on 16th October, 1958. The respondent then moved the Calcutta High Court under Article 226 of the Constitution and prayed for a writ of *certiorari* or other appropriate writ or order quashing the said impugned order of discharge passed against him. Sinha, J., who heard the writ petition allowed the petition and directed that a writ in the nature of *certiorari* quashing and/or setting aside the impugned order be issued. A further writ in the nature of *mandamus* was also issued directing the respondents to the Writ Petition not to give effect to the said impugned order. To the petition filed by the respondent, he had impleaded eight respondents, the principal amongst them being the appellant Corporation and the Union of India.

Aggrieved by the decision of Sinha, J., the appellants preferred an appeal under the Letters Patent before a Division Bench of the said High Court. Bose, C.J. and Debabrata Mukherjee, J., who heard the Letters Patent Appeal substantially agreed with the view taken by Sinha, J. and confirmed the order passed by him. The appellants then applied for and obtained a certificate of fitness from the said High Court and it is with the said certificate that they have come to this Court in appeal. On similar facts, the appellants have brought to this Court the other fourteen appeals, and a common question which has been raised by the learned Solicitor-General on behalf of the appellants is that the High Court was in error in holding that the

fall under section 11 (2) if as a result of the alteration made by the Central Government any employee does not want to work with the Corporation, he is given the option to leave its employment on payment of compensation provided by the last part of section 11 (2). Thus, the scheme of the two sub-sections of section 11 is clear. The employees of the insurers whose controlled business has been taken over, become the employees of the Corporation, then their terms and conditions of service continue until they are altered by the Central Government, and if the alteration made by the Central Government is not acceptable to them, they are entitled to leave the employment of the Corporation on payment of compensation as provided by section 11 (2).

After the Corporation took over the controlled business of insurers under the Act, two circulars were issued by the Managing Director, the first on 30th September, 1957 and the second on 2nd December, 1957. These circulars need not detain us at this stage, because, by themselves, they were without any authority in law. However, we would have occasion to refer to the second circular later on.

On 30th December, 1957, an order was issued by the Central Government in exercise of the powers conferred on it by section 11 (2) of the Act. This order was issued on blue paper and has been described by the High Court as the 'blue order'. We will refer to this order as 'the order' in the course of this judgment. This order was issued because the Central Government was satisfied that for the purpose of securing uniformity in the scales of remuneration and the other terms and conditions of service applicable to certain classes of employees of insurers, it was necessary to clarify the position by making specific and clear provisions in that behalf. The object of the order was to secure the interests of the Corporation and its policyholders by making a reduction in the remuneration payable to the employees governed by the order, and effecting a revision of the other terms and conditions applicable to them. This order was confined in its operation to the officers of the insurers who were known as 'Field Officers', and so, the order was named as the 'Life Insurance Corporation Field Officers' (Alteration of Remuneration and Other Terms and Conditions of Service) Order, 1957. It consists of 12 clauses. Clause 2 defines *inter alia*, a Field Officer. In 1962, the designation 'Field Officer' was changed into a 'Development Officer', though curiously enough the title of the Order still refers to the Field Officer and does not incorporate a consequential amendment in the said designation. The definition of the 'Development Officer' shows that it takes in a person however he was designated before the appointed day if he was wholly or mainly engaged in the development of new life insurance business for the insurer by supervising, either directly or through one or more intermediaries, the work of persons procuring or soliciting new life insurance business, and who was remunerated by a regular monthly salary, and who has become an employee of the Corporation under section 11 of the Act. This definition excludes certain categories of employees to which it is not necessary to refer. It is thus clear that the Order was intended to prescribe the terms and conditions of service in respect of Development Officers who had become employees of the Corporation under section 11 (1) of the Act. Clause 3 of the Order prescribes the duties of the Development Officer. Clause 4 prohibits the Development Officers from engaging themselves in certain activities. Clause 5 provides for the scales of pay and allowances. Clause 6 deals with the matter of leave and retirement, and provides that in the matter of leave and retirement, Development Officers shall be governed by the Life Insurance Corporation (Staff) Regulations, 1960, as amended from time to time. Clause 7 provides for increments, and clause 8 deals with new business bonus, while clause 9 refers to promotion of Development Officers. Clause 10 is relevant for our purpose and must be set out in full:

10. *Penalties and termination of service :*

(a) In case of unsatisfactory performance of duties by Development Officer or if a Development Officer shows negligence in his work or is guilty of misconduct or is otherwise incapable of discharging his duties satisfactorily, his remuneration may be reduced or his services may be terminated after giving him an opportunity of showing cause against the action proposed to be taken in regard to him and after conducting such enquiry as the Corporation thinks fit.

(b) The services of any Development Officer may, with the prior approval of the Chairman of the Corporation, be terminated without assigning any reason after giving the Development Officer three months' notice thereof in writing."

Clause 11 prescribes that the actual pay and allowances admissible to any Development Officer under the scale of pay specified in paragraph 5 shall be determined in accordance with such principles as may be laid down by the Corporation by regulations made in this behalf under section 49 of the Act. The last clause lays down that if a doubt arises as to the interpretation of any of the provisions of the Order, the matter will be decided by the Central Government.

It is thus clear that in regard to the Field Officers subsequently designated as Development Officers who became the employees of the Corporation after the appointed day, the Order provides a self-contained code in dealing with the material terms and conditions of service of the said Officers. In regard to the scales of pay and allowances which have been prescribed by clause 5, clause 11 contemplates that the actual pay and allowances admissible to any Development Officer will have to be determined in accordance with the principles which the relevant regulation would in that behalf lay down, and so, in the matter of scales of pay and allowances clause 5 read with clause 11 has to be co-related with the relevant regulation which had to be subsequently framed. In regard to the other terms and conditions of service, however, the Order makes specific and clear provisions. That being so, there can be no doubt that in regard to the Officers to whom the Order applies, if any action is intended to be taken for the termination of their services, it has to be taken under clause 10 (a) or (b). Clause 10 (a) deals with two alternatives ; it empowers the appropriate authority to reduce the remuneration of the Development Officer or to terminate his services ; in either case, an opportunity of showing cause against the action proposed to be taken has to be given to him, and an enquiry has to be conducted in the manner which the Corporation may think fit. If the Development Officer shows negligence in his work, or is guilty of misconduct, or is otherwise incapable of discharging his duties satisfactorily, the Corporation may reduce his remuneration or may terminate his service ; but that can be done only after complying with the conditions prescribed by clause 10 (a).

Clause 10 (b) empowers the Corporation to terminate the services of the Development Officer without assigning any reason and without holding any enquiry or giving him an opportunity to show cause, provided, of course, the order terminating his services is passed with the prior approval of the Chairman of the Corporation. This power can be exercised without complying with clause 10 (a) and is independent of it. Thus, in the matter of penalties and termination of service, two alternative powers are conferred on the authority and they are contained in the sub-clauses (a) and (b) of clause 10.

As envisaged by clause 11 of the Order, Regulations were framed in 1958 by the Life Insurance Corporation under section 49 of the Act read with clause 11 of the Order. These Regulations contain five clauses : the first gives the title of the Regulations ; the 2nd defines the "Categorisation Order" which is the same as the blue order, as well as the "Corporation" and the "Field Officer". Regulation 3 deals with the conveyance allowance. Regulation 4 provides for the manner of fixing the pay of the Development Officer. Regulation 4 (1) lays down that the basic pay in the scale of pay prescribed for Field Officers by the Order shall be so fixed that the said pay together with the dearness allowance and conveyance allowance is not less than the total monthly remuneration to which the Officer was entitled before 31st August, 1956. Regulation 4 (2) provides that where the work of the Field Officer has been either below or above the adequate standard, the Corporation may fix his basic pay at such stage in the scale as it may think fit. Regulation 4 (3) prescribes that in judging a Field Officer's work, the Corporation shall observe the principles contained in the circular issued by the Managing Director on 2nd December 1957. Regulation 5 provides for the computation of total monthly remuneration which was paid to the Officer on 31st August 1955. It will be noticed that clause 4 (3) of the Regulations makes the circular issued by the Managing Director on 2nd December, 1957, a part of the regulation by treating it as its annexure and referring to its

provisions for the purpose of determining the remuneration payable to the Development Officer. That is how the said circular which, when it was issued, had no legal authority, has now become valid as a part of the Regulations issued by the Corporation under section 49 of the Act read with clause 11 of the Order.

This circular contains five paragraphs. The object of the material provisions of this circular is to determine the quality of the work which the Development Officer puts in which would afford a basis for fixing his remuneration. Paragraph 4 of this circular deals with the problem of fitting in the respective Development Officers in the pay scales provided by clause 5 of the Order. It consists of eight clauses (a) to (h). In the present appeals, we are concerned with the last of these clauses. Paragraph 4, clause (h) reads thus :—

“If the actual performance is less than 50% of the revised quota, the cases of such Field Officers will be referred to a Committee to be specially appointed in each Zone. The Committee will go through the past records of such Field Officers and decide whether they could be continued as Field Officers either as Probationers or on substantially reduced remunerations. In the case of those who cannot be continued as Field Officers, the Committee will examine whether any of them could be absorbed in administration and where this is possible, the Committee will fix the remuneration in accordance with the rule to be prescribed. Where the Committee decides that the poor performance of a Field Officer was not due to circumstances beyond his control or that he has made no efforts and not shown inclination or willingness to work, the services of such Field Officers will be terminated.”

It is clear that paragraph 4 (h) deals with cases of persons whose actual performance is less than 50% of the revised quota, and as such, who are regarded an ineligible for fitting in the employment of the Corporation. Their cases are required to be referred to the Committee specially appointed in each Zone, and on examining the record of these Officers, if the Committee comes to the conclusion that some of them cannot be continued as Field Officers, it may enquire whether any of them could be absorbed in administration, and if yes, their remuneration may be suitably fixed : if the Committee thought that the poor performance was not due to circumstances beyond his control, or that he made no efforts or showed no inclination or willingness to work, the services of such Field Officer will be terminated. Paragraph 5 deals with the question of Ex-Branch Secretaries and Supervisory Officers, and it provides that if their work is found to be unsatisfactory, the Committee may recommend termination of the services of the officers concerned. In other cases, the Committee will make recommendations as to whether they should continue such Inspectors as Field Officers and if yes, on what remuneration ; or whether their services could be utilised in any other capacity in the Corporation, and if yes, on what remuneration ?

The learned Solicitor-General has contented that when the Corporation took over the controlled business of insurers in this country on the appointed day, it was found that a large number of employees in the category of Field Officers were either incompetent or unwilling to work efficiently, and so, it was thought desirable, in the interests of the Corporation itself and in the interests of the policy-holders, to terminate their services. That is why a well-devised scheme was framed by the circular and adopted in the Regulations laying down principles for determining the efficiency of the work done by the said Officers. He urges that by the application of the principle laid down by paragraph 4 (h) of the circular, it was competent to the Corporation to terminate the services of the respondents, and that is what in fact has been done in each of the cases before us. In support of this plea, he has relied on the fact that paragraph 4 (h) empowers the Corporation to terminate the services of incompetent Officers and paragraph 5 also gives the same power in respect of Ex-Branch Secretaries and Supervisory Officers. The argument is that where cases are dealt with under the provisions of paragraph 4 (h) or paragraph 5 of the circular, there can be no question of applying the provisions of clause 10 of the Order.

It is common ground that before terminating the services of the respective respondents in the group of appeals before us, no enquiry has been held and no opportunity has been given to the said officers as required by clause 10 (a) of the Order. It is also common ground that the impugned termination of their services has not been effected under clause 10 (b) of the Order. The respondents' contention is that

the termination of their services can be brought about only under clause 10 (a) or 10 (b) of the Order, and since it has not been so brought about, the impugned orders are invalid. On the other hand, the learned Solicitor-General contends that the power to terminate services conferred by paragraph 4 (h) of the circular is independent of clause 10 of the Order, and the same can be, and has been, validly exercised in the present cases.

In considering the validity of these rival contentions, it is necessary to bear in mind the true legal position about the character of the relevant statutory provisions. It is plain that the provisions contained in section 11 (2) of the Act are paramount and would over-ride any contrary provisions contained in the Order or the Regulations. Subject to the provisions of section 11 (2), the provisions of the Order will prevail, because the Order has been issued by the Central Government by virtue of the powers conferred on it by section 11 (2) itself. The provisions of the Order in law partake of the character of the Rules framed under section 48 of the Act. Thus next to the provisions of section 11 (2) of the Act will stand the provisions of the Order. Then we have the Regulations issued by the Corporation under section 49 (1) of the Act. But it must be borne in mind that the power of the Corporation to make Regulations is burdened with the condition that these Regulations must not be inconsistent with the Act and the Rules framed thereunder, so that if any of the provisions contained in the Regulations made by the Corporation under section 49 are found to be inconsistent either with section 11 (2) or with the Order made by the Central Government under section 11 (2), they would be invalid. It is in the light of this legal position that the problem posed before us in the present appeals must be decided.

We have already noticed that as soon as the Field Officers or the Development Officers became the employees of the Corporation on the appointed day under section 11 (1), they initially carried with them their original terms and conditions of service, and this state of affairs continued until the Order was issued on 30th December, 1957. As we have already seen, the provisions of this Order provide for the terms and conditions of service in matters covered by the Order. In regard to remuneration, the Order did not completely resolve the problem, but it left the determination of the scale of pay and allowances payable to each employee in the light of the Regulations which would be framed by the Corporation in pursuance of the authority conferred on it by clause 11 of the Order; but in regard to the termination of services of the employees, clause 10 has made a specific provision, and wherever the Corporation wants to terminate the services of any Development Officer, clause 10 has to be complied with. It is true that paragraph 4 (h) of the circular purports to say that in cases falling under the last part of the said paragraph, the services of the Field Officers will be terminated. If the said portion of paragraph 4 (h) is interpreted to mean that it confers on the Corporation an authority to terminate the services of the Development Officer independently of clause 10 of the Order, it would be inconsistent with the said clause and would, therefore, be invalid. We are, however, satisfied that the said portion of para. 4 (h) really means that in cases falling under it, the services of the Officers concerned would be liable to be terminated, and that means that the termination of the services of the said Officers must be effected in the manner prescribed by clause 10 of the Order. That is how para. 4 (h) and clause 10 can be reasonably reconciled. What we have said about para. 4 (h) is equally true about para. 5 of the circular.

In regard to the fixation of remuneration, however, the position is that clause 5 of the Order fixes the scales of pay and allowances and leaves it to the Regulations to lay down the principles in the light of which each individual case should be judged. It was, therefore, perfectly competent to the Corporation to adopt the circular issued by the Managing Director, and in consequence, lay down the principles which should be followed in fitting individual Officers into the scheme prescribed by clause 5 of the Order. But it is necessary to emphasise that the scope and purpose of fitting the Officers obviously is to treat the Officers as continuing to remain in the category of Development Officers and prescribe their remunerations accordingly. The total

amount of remuneration would undoubtedly be determined in the light of the principles prescribed by the circular, but under the guise of fitting in a particular Officer in the light of the said principles it would not be open to the Corporation to demote the Officer from the grade of Development Officer to a lower grade ; that would be beyond the competence of the Regulations. All that the Regulations can purport to do is to lay down principles for fixing the actual pay and allowances admissible to the Development Officers. That is the direction contained in clause 11 of the Order and it is within the limits of the said direction that the principles can be validly laid down by the Regulations. After the remuneration is determined in the light of the principles laid down by the Regulations, if any Officer is not inclined to accept the said altered remuneration, occasion may arise for the Corporation to exercise its power under section 11 (2) of the Act and pay him compensation as therein contemplated. That, however, is a matter with which we are not concerned in the present appeals. What we are concerned with in the present appeals is the validity of the orders terminating the services of the Officers on the ground that they are found to be incompetent. If the Officers were found to be incompetent in the light of the provisions of para. 4 (h) of the circular, their services could no doubt be terminated, but such termination of services must conform to the requirements of clause 10 (a) or (b) of the Order. As we have already seen, it is common ground that the impugned orders terminating the services of the respective respondents have not been passed in accordance either with clause 10 (a) or 10 (b), and so, they must be held to be invalid.

It is true that in the present proceedings the respondents had claimed relief under Article 311 (2) of the Constitution and had in their Writ Petitions challenged the validity of the Order and the Regulations. That, however, does not disentitle the respondents from claiming the same relief on the alternative basis that though the Order and the Regulations may be valid, the impugned orders whereby their services have been terminated are invalid for the reason that they do not comply with clause 10 of the Order. Therefore, we are satisfied that the learned Solicitor-General is not justified in contending that the impugned orders can be sustained under para. 4 (h) of the circular which has been adopted by the Regulations as annexure thereto.

There is one more point which has yet to be examined. In regard to the case of Haridas Roy who is the respondent in C.A. No. 917 of 1963, the learned Solicitor-General has contended that the order terminating his services is valid either under para. 4 (h) of the circular or under section 11 (2) of the Act. Haridas Roy was originally employed by the Hindustan Co-operative Insurance Society Ltd., before the appointed day as an Inspector of Agents. After the Corporation took over the controlled business of the said Insurance Co., he was appointed as a Field Officer under the Order, and the order of his appointment was communicated to him on 15th February, 1958. It appears that on 9th August, 1958, he was told that his case had been considered by the Zonal Committee and it had been decided to absorb him in the office as an Assistant on the emoluments mentioned in the order. Haridas Roy declined to accept this assignment and stated that he wanted to continue as a Field Officer as before. Thereupon, his services were terminated by an order dated 18th September, 1958. In this letter, Roy was told that his case had been carefully considered by the Zonal Committee and he was offered *ex gratia* to be absorbed on the administrative side as an Assistant ; since he refused to accept that assignment, his services were terminated on payment of one month's salary in lieu of notice less deductions, if any. This letter also told Roy that there were no extenuating circumstances in his case and his work was found to be of very poor quality. It would be noticed that the Corporation presumably examined the performance of Roy in the light of the principles laid down by the relevant provisions in the circular and held that his case fell under the last part of para. 4 (h) of the said circular. That only means that having regard to his poor performance Roy became eligible to be dealt with under clause 10 of the Order. It was not open to the Corporation to require Roy to accept an assignment in a lower or different category. What the

Regulations authorised to do is merely to determine his salary in the category of Development Officers, and so, we do not see how the order terminating his services because he refused to take an assignment as an Assistant can be justified. It would have been open to the Corporation to fix Roy's salary at the minimum in the grade prescribed by clause 5 of the Order and if he had refused to take it, an occasion may have arisen for the operation of section 11 (2) of the Act. Therefore, we are satisfied that the case of Roy cannot be distinguished from the cases of other respondents in the present group of appeals.

The result is, the orders passed by the High Court are confirmed, and the appeals are dismissed with costs. One set of hearing fees.

P.R.N.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, P. B. GAJENDRAGADKAR AND T. L. VENKATARAMA AIYAR, JJ.

Pukhraj

.. *Appellant**

v.

D. R. Kohli, Collector of Central Excise, Madhya Pradesh
and Vidarbha and another

.. *Respondents.*

Sea Customs Act (VIII of 1878), section 167 (8)—Scope of powers under—Penalty—Limits—Section 178-A—Scope.

Under section 167 (8) of the Sea Customs Act it is within the jurisdiction of the Collector of Central Excise to impose a penalty exceeding Rs. 1,000. Where section 167 (8) is found to be applicable confiscation of the smuggled goods can be ordered and it is not necessary that the goods are found with a person who was concerned with their importation.

Section 178-A of the Sea Customs Act places the burden of proving that the goods are not smuggled goods, on the person from whose possession the said goods are seized, where it appears that the goods were seized under the provisions of the Sea Customs Act in the reasonable belief that they are smuggled goods. Where that onus is not discharged the statutory presumption remains un rebutted and under section 167 (8) of the Sea Customs Act the goods are liable to confiscation.

Appeal from the Judgment and Order dated the 20th March, 1959, of the Bombay High Court at Nagpur in Special Civil Application No. 322 of 1958.

A.S. Bobde and Ganpat Rai, Advocates, for Appellant.

G.C. Mathur and P. D. Menon, Advocates, for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—On the 26th July, 1958, the Collector of Central Excise, Nagpur, passed an order directing absolute confiscation of five bars of gold weighing 290.6 tolas found in the possession of the appellant Pukhraj and imposing upon him a personal penalty of Rs. 25,000 under section 167 (8) of the Sea Customs Act, 1878 read with section 19 of the said Act and section 23-A of the Foreign Exchange Regulation Act, 1947. Aggrieved by the said order, the appellant filed a Writ Petition in the High Court of Bombay at Nagpur under Articles 226 and 227 of the Constitution on the 15th September, 1958. By this petition, the appellant claimed a Writ of *Certiorari* or other appropriate writ or order quashing the impugned order. It was urged by him in support of his petition, *inter alia*, that section 178-A of the Sea Customs Act was unconstitutional in that it infringed the appellant's fundamental right under Article 19 (1) (f) and (g) of the Constitution. It was also urged that on the merits, the said impugned order was not justified by the relevant statutory provisions of the Sea Customs Act read with the Foreign Exchange Regulation Act. The High Court rejected the appellant's challenge to the validity of section 178-A and held that the order directing the confiscation of five bars of gold was valid. The High Court, however, took the view that the direction issued by the Collector of Central Excise imposing a personal penalty of Rs. 25,000 on the appellant was invalid and so, the said direction was set aside and

* C.A. No. 511 of 1960.

15th March, 1962.

a writ issued in that behalf. The appellant then applied for and obtained certificate from the said High Court and it is with the said certificate that he has come to this Court for challenging the correctness of the order passed by the High Court by which the confiscation of gold in question has been held to be valid.

The main point on which the certificate was granted by the High Court to the appellant was in regard to the constitutional validity of section 178-A. That question has, in the meanwhile, been decided by this Court on the 25th of September, 1961, in Civil Appeals Nos. 408 to 410 of 1960 and other companion appeals¹. The judgment of the Constitutional Bench dealing with those appeals has upheld the validity of section 178-A and so, the principal point which the appellant wanted to raise before this Court is now concluded against him. For the appellant, Mr. Bobde has, however, urged three other contentions before us in support of his case that the confiscation of gold is not justified.

Before dealing with these contentions, it is necessary to mention very briefly the relevant facts which led to the confiscation of gold. The appellant is a goldsmith by profession and owns a gold and silver shop at Rajnandgaon in Madhya Pradesh. On 25th October, 1956, whilst he was travelling by the passenger train from Calcutta on the Calcutta-cum-Nagpur route, he was searched at Raigarh railway station and found to be in possession of five pieces of gold bullion weighing 290.6 tolas valued at Rs. 29,835 approximately. The said gold was then seized by the Officer concerned acting on a reasonable belief that it was smuggled gold and notice was issued against the appellant on 20th May, 1957, calling upon him to show cause why action should not be taken against him for having contravened the notification issued by the Government of India No. 12 (11)-F. I/48 dated 25th August, 1948, under the Foreign Exchange Regulation Act, 1947, read with section 23-A of the said Act and section 19 of the Sea Customs Act and punishable under item (8) of section 167 of the Sea Customs Act. The Appellant sent a reply and thereupon, the Collector of Central Excise held an enquiry. At the enquiry the appellant appeared by counsel and examined four witnesses in support of his plea that he was in possession of gold which belonged to him and which was not smuggled gold at all. Documentary evidence in the form of account-books was also produced by the appellant in support of his plea. The Collector of Central Excise disbelieved the evidence adduced by the appellant and came to the conclusion that the presumption arising under section 178-A of the Sea Customs Act had not been rebutted by the appellant and so, he proceeded to pass the impugned order confiscating gold and imposing on the appellant a personal penalty of Rs. 25,000. It is in the light of these facts that the three contentions raised by Mr. Bobde fall to be considered in the present appeal.

The first argument raised in support of the appeal is that the confiscation of gold is not justified under section 167 (8) because it has been found by the High Court that the appellant is not a person concerned in the offence of importation of the said gold. It appears that in dealing with the question as to whether the personal penalty imposed upon the appellant is valid or not, the High Court has relied on two considerations. It has held that the jurisdiction of the officer to impose a personal penalty was confined to the imposition of a penalty only up to Rs. 1,000 and no more, and in support of this conclusion, the High Court relied on certain observations made by this Court in *F. N. Roy v. Collector of Customs, Calcutta*². This question has been recently considered by this Court in *M/s. Ranchhodas Atmaram & another v. The Union of India & others*³, and it has been held that the language in item (8) of section 167 is clear and it permits the imposition of a penalty in excess of Rs. 1,000 and that must be given effect to whatever may have been the intention in other provisions. So, it is clear that the High Court was in error in taking the view that under section 167 (8), it was not within the jurisdiction of the Collector

1. *Collector of Customs, Madras v. Nathalla Sampathu Chetty* (1962) 1 S.C.J. 68 : (1962) 1 M.L.J. (S.C.) 43 : (1962) 1 An.W.R. (S.C.) 43 : (1962) M.L.J. (Cr.) 1.

2. (1957) M.L.J. (Cr.) 684 : (1957) S.C.J.

734 : (1957) S.C.R. 1151 at p. 1158.

3. (1961) 2 M.L.J. (S.C.) 120 : (1961) 2 An.W.R. (S.C.) 120 : (1961) M.L.J. (Cr.) 620 : (1961) 2 S.C.J. 529 : A.I.R. 1961 S.C. 935.

of Central Excise to impose a penalty exceeding Rs. 1,000. The High Court has also held that the appellant was not shown to have been concerned with the importation of the smuggled gold, though he was found in possession of it and this finding, according to the High Court, justified the conclusion that a personal penalty could not be imposed on him. We are not called upon to consider in the present appeal the correctness or propriety of this conclusion because there is no appeal by the respondent Collector of Central Excise challenging this part of the High Court's order. Basing himself on the finding of the High Court that the appellant was not concerned in the importation of smuggled gold, Mr. Bobde argues that even the goods cannot be confiscated under section 167 (8). In our opinion, this argument is clearly misconceived. Section 167 (8) clearly provides, *inter alia*, that if any goods, the importation of which is for the time being prohibited or restricted by or under Chapter IV of the Act, be imported into India contrary to such prohibition or restriction, such goods shall be liable to confiscation. If section 167 (8) applies, then there can be no doubt that as soon as it is shown that certain goods have been imported contrary to the statutory prohibition or restriction, they are liable to confiscation and the confiscation of the said goods is not based on the fact that they are necessarily found with a person who was concerned with their importation. Therefore, once section 167 (8) is held to be applicable, the validity of the order directing the confiscation of the smuggled goods is beyond any challenge.

The next question to consider is whether section 167 (8) applies to the facts of this case, and that takes us to the relevant notification issued by the Government of India in 1948. This notification imposed restrictions on import of gold and silver and it has been issued under section 8 (1) of the Foreign Exchange Regulation Act, 1947. The effect of this notification, *inter alia*, is that except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place outside India any gold, coin, gold bullion, gold sheets or gold ingot, whether refined or not. Thus, bringing into India gold from outside is prohibited by this notification unless the said gold is brought with the general or special permission of the Reserve Bank. Section 23 of the said Act provides for penalty and procedure in respect of contravention of its provisions and of rules, orders or directions issued thereunder. Section 23-A provides that without prejudice to the provisions of section 23 or to any other provision contained in the said Act, the restrictions imposed by sub-sections (1) and (2) of section 8 shall be deemed to have been imposed under section 19 of the Sea Customs Act, and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word "shall" therein the word "may" was substituted. It would, thus, be noticed that the combined effect of the aforesaid provisions of the two Acts and the relevant notification is that the notification of 1948 has the force of a notification issued under section 19 of the Sea Customs Act and, in consequence, gold imported in contravention of the said notification is liable to be seized under section 178 of the said Act and renders the person in possession of the said gold liable for proceedings under section 167 (8) of the said Act; and since the matter falls to be considered under the relevant provisions of the Sea Customs Act, section 178-A is also applicable. This position is not disputed.

Now section 178-A places the burden of proving that the goods are not smuggled goods on the person from whose possession the said goods are seized, where it appears that the said goods are seized under the provisions of the Sea Customs Act in the reasonable belief that they are smuggled goods. Once it is shown that the goods were seized in the manner contemplated by the first part of section 178-A it would be for the appellant to prove that the goods were not smuggled goods; and since it has been held by the Collector of Central Excise that the appellant had not discharged the onus imposed on him by section 178-A, the statutory presumption remained un rebutted and so, the goods must be dealt with on the basis that they are smuggled goods. As soon as we reach this conclusion, it follows that under section 167 (8) of the Sea Customs Act, the said goods are liable to confiscation. That is the view taken by the High Court when it rejected the appellant's prayer for a writ quashing the order of confiscation passed by the Collector

of Central Excise in respect of the gold in question, and we see no reason to interfere with it.

The next argument urged by Mr. Bobde is that certain witnesses whose evidence was recorded by the Collector of Central Excise in the enquiry before him, were not produced for cross-examination by the appellant. In our opinion, there is no substance in this argument. This complaint relates to the evidence of Anwar, Marotrao and his brother Rambhau. These three persons, it is alleged, made their statements in the absence of the appellant. It was, however, stated before the High Court by Mr. Abhyankar for the Department that Anwar was, in fact, examined in the presence of the appellant's counsel and the appellant's counsel did not cross-examine him. This statement was accepted by Mr. Sorabji who appeared for the appellant, and so, no valid complaint can be made that Anwar gave evidence in the absence of the appellant and the appellant had no opportunity to cross-examine him. Then, as regards Marotrao and Rambhau, their statements were intended to show that the appellant's case that he had got the gold melted through them was not true. At the enquiry, the appellant gave up this stand and did not adhere to his earlier version that the gold in question had been melted with the assistance of the said two witnesses. Since it became unnecessary to consider that plea because of the change of attitude adopted by the appellant, it was hardly necessary to allow the appellant to cross-examine the said two witnesses. Their version on the point was no longer inconsistent with the subsequent case set up by the appellant. Therefore, there is no substance in the argument that the enquiry held by the Collector of Central Excise was conducted unfairly and the procedure adopted at the said enquiry was inconsistent with the requirements of natural justice.

The last contention raised by Mr. Bobde was that there is nothing on record to show that the seizure of gold from the appellant had been effected by the officer concerned acting on a reasonable belief that the said gold was smuggled. It would be recalled that section 178-A of the Sea Customs Act requires that before the burden can be imposed on the appellant to show that the goods in question were not smuggled, it has to be shown that the goods had been seized under the said Act and in the reasonable belief that they are smuggled goods. The argument is that the question as to whether there was a reasonable belief or not is justiciable and since there is no material on the record to show that the belief could have been reasonable, the statutory presumption cannot be raised. In our opinion, this argument is not well-founded. There are two broad features of this seizure which cannot be ignored. The first feature on which the officer relied is supplied by the quantity of gold in question. It was found that the appellant was carrying on his person five pieces of gold bullion weighing as much as 290.6 tolas. This large quantity of gold valued at nearly Rs. 30,000 itself justified a reasonable belief in the mind of the officer that the gold may be smuggled. In that connection, it may not be irrelevant to remember that the said officer had received positive information in the month of September, 1956, regarding the smuggling of gold by the appellant. That is why he was intercepted by the officer on 25th October, 1956, at the Raigarh railway station at 16.30 hours. Then the other fact on which the reasonable belief can be founded is the suspicious circumstances of the appellant's journey. The appellant was found travelling without a Railway ticket and his explanation as to how he came to be in the said passenger train is obviously untrue. A person carrying a large quantity of gold and found travelling without a ticket may well have raised a reasonable belief in the mind of the officer that the gold was smuggled. The object of travelling without a ticket must have been to conceal the fact that the appellant had travelled all the way from Calcutta at which place the gold must have been smuggled. The story subsequently mentioned by the appellant about his journey to Tatanagar which has been disbelieved brings into bold belief the purpose which the appellant had in mind in travelling without a ticket. After all, when we are dealing with a question as to whether the belief in the mind of the officer who effected the seizure was reasonable or not, we are not sitting in appeal over the decision of the said officer. All that we can consider is whether there is

ground which *prima facie* justifies the said reasonable belief. That being so, we do not think there is any substance in the argument that the seizure was effected without a reasonable belief and so is outside section 178-A.

In the result, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T.L. VENKATARAMA AYYAR, JJ.

Nawab Zain Yar Jung, (since deceased) and others .. *Appellants**

v.

The Director of Endowments and another .. *Respondents.*

Wakf Act (XXIX of 1954), sections 3 (1) and 28 and Hyderabad Endowments Regulations, 1348-F. (1939)—Applicability to secular trusts—Deed—Interpretation—Principles.

If two constructions are reasonable possible, the one which gives effect to all the clauses of the document must be preferred to that which defeats some of its clauses. In the instant case if the document is held to be a wakf, the directions in the document that charitable purposes should be selected without distinction of religion, caste or creed, would obviously be defeated and that undoubtedly supports the conclusion, that the document evidences a public charitable trust and not a wakf. As the document created a trust for public charitable purposes, some of which are outside the limits of the wakf, the conclusion is inescapable that the trust created is not a wakf but a secular comprehensive public charitable trust. Section 3 (1) of the Wakf Act, 1954, cannot apply to the trust and its registration under section 28 is invalid and inoperative.

Appeal by Special Leave from the Judgment and Order dated the 20th October, 1959 of the Andhra Pradesh High Court, in Writ Petition No. 337 of 1959.

M.C. Setalvad, Attorney-General for India, *C.K. Daphtary*, Solicitor-General of India and *A.V. Viswanatha Sastri*, Senior Advocate (*Anwarullah Pasha* and *S. Ranganathan*, Advocates and *J.B. Dadachanji*, *O.C. Mathur*, and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, with them, for Appellants.

D. Narasaraaju, Advocate-General for State of Andhra Pradesh (*G.R. Ekbote* and *D. Prasanna Kumari*, Advocates and *D. Venkatappayya Sastri* and *P.D. Menon*, Advocates with him, for Respondents Nos. 1 and 2.

G.S. Pathak, Senior Advocate (*S.M. Dubash*, and *V.J. Merchant*, Advocates of *M/s. Gagrat & Co.*, with him, for Respondent No. 3.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal is directed against the order passed by the Andhra High Court dismissing an application for a Writ filed by the appellants in that Court. The four appellants are the Trustees appointed by the Nizam of Hyderabad by a Trust-deed executed by him on 14th June, 1954. On the 2nd March, 1959, respondent No. 1 who is the Director of Endowments and Joint Secretary, Board of Revenue, served a notice on the appellants calling upon them *inter alia*, to register the said Trust under the Hyderabad Endowment Regulation 1348-F (1939) and to render accounts of the same from the date of its inception to the date of the notice within a week. The appellants disputed the authority of respondent No. 1 to issue the said notice and urged that the trust was not governed by the said Regulation. Thereupon, the first respondent issued an order on 23rd March, 1959 and in pursuance of it, sealed the Pay Office of the said Trust. Subsequently on the 25th March, 1959, the said seal was removed in pursuance of the order issued by the second respondent, the Government of Andhra Pradesh. The appellants then were called upon to produce their books of accounts in order that

the first respondent may scrutinise them and ascertain all the relevant facts in respect of the Trust as required by rule 8 of the Rules framed under the said Regulation. The appellants were also directed not to operate upon the banks with which the moneys of the Trust were deposited and not to spend any sum on the objects of the Trust until further orders.

On 24th March, 1959, appellants 1 to 3 filed the present Writ Petition and prayed *inter alia* that a writ of prohibition and *certiorari* or other writ or appropriate order or direction should be issued in respect of the notice served on them by the 1st respondent on 2nd March, 1959 and his subsequent order of 23rd March, 1959. The 4th appellant was subsequently appointed an additional trustee and was thereafter added as a petitioner to the said petition on 12th October, 1959.

In their Writ Petition, the appellants alleged that the said regulation had ceased to be operative in Hyderabad by reason of section 6 of Part B States (Laws) Act, 1951 (III of 1951) which had been extended to Hyderabad as from 1st April, 1951. Section 6 of the said Act provides that if immediately before the appointed day, there was in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that shall, save as otherwise expressly provided, stand repealed. Amongst the laws extended to Hyderabad by the said Act were the Indian Trust Act, 1882, Charitable Endowments Act (VI of 1890) and Charitable and Religious Trusts Act (XIV of 1920). Subsequently, by Central Act II of 1951, the Civil Procedure Code was made applicable to Hyderabad and section 92 of the said Code thus applied to proceedings contemplated by it. The appellants urged that the aforesaid laws which were thus extended to Hyderabad corresponded to the Hyderabad Endowments Regulation and so, by virtue of the provisions of section 6 of the Part B States (Laws) Act, the said Regulation stood repealed as from 1st April, 1951. According to the appellants, the said Regulation and the Rules framed thereunder were *ultra vires* also for the reason that they were violative of the fundamental rights guaranteed by Articles 14, 19 and 31 of the Constitution. It is broadly on these grounds that the appellants based their claim for an appropriate writ against both the respondents.

On the other hand, the respondents contended that the Regulation and the Rules framed thereunder were not co-extensive with the provisions of the Acts which had been extended to Hyderabad by the Part B States (Laws) Act and so, section 6 of the Act was inapplicable to them. The respondents also pleaded that the said Regulation and the Rules did not contravene any of the fundamental rights guaranteed by Part III of the Constitution. As to the orders issued by respondent No. 1, it was the respondents' case that the said orders were justified and could not be set aside.

The High Court held that the order passed by the 1st respondent prohibiting the disbursement of moneys by the appellants was inappropriate and that the first respondent was not justified in directing the seizure of account books and records and taking forcible possession of the same. However, on the main points raised by the appellants, the High Court has held that section 6 of the Part B States (Laws) Act did not apply and so, the Regulation and the Rules framed thereunder cannot be said to have been repealed as from 1st April, 1951. The contention raised by the appellants that the said Regulation and the Rules contravened the fundamental rights guaranteed by Articles 14, 19 and 31 was likewise rejected. In the result, the High Court dismissed the Writ Petition filed by the appellants. The appellants then applied for a certificate to the High Court, but their application was rejected. That is why the appellants moved for and obtained Special Leave from this Court and it is with the Special Leave thus granted to them that they have come to this Court by the present appeal. The appeal seeks to raise the same two questions for our decision.

While the appeal was pending in this Court, certain developments took place in regard to the trust in question and it is necessary to mention them. It appears that on 10th September, 1956, the Muslim Wakf Board, Hyderabad, constituted

under section 9 of the Wakf Act, 1954 (Central Act No. XXIX of 1954), wrote to the Secretary of the Trust that in the opinion of the Board, the Trust was a wakf within the meaning of the Wakf Act and that steps should be taken for its registration under section 28 of the said Act. For nearly three years thereafter, no step was taken to register the wakf nor did the Board pursue its demand that the trust should be registered. In March, 1959, however, the Board sent a further communication to the Secretary and called upon him to get the trust registered. The appellants did not comply with this requisition. On 18th December, 1960, the Board purported to exercise its authority under section 28 of the Wakf Act and itself caused the registration of the trust to be made. The registration so made was published in the Andhra Pradesh Official Gazette on 12th January, 1961. Respondent No. 2 then moved the Andhra High Court by a Writ Petition No. 791 of 1961 for quashing the said registration of the Trust. It urged that the trust in question was not a wakf and so, the provisions of the Wakf Act were inapplicable to it; and thus, the validity of the registration of the trust became a matter of dispute between the Wakf Board and respondent No. 2.

When this appeal was called on for hearing before this Court on 6th December, 1961, the learned counsel for both the parties informed the Court about the developments in question and stated that the registration of the trust had changed the complexion of the dispute which made it necessary that this Court should consider the nature of the trust and decide whether the registration of the said trust under section 28 of the Wakf Act was valid or not. Meanwhile, on 9th August, 1961, the Wakf Board had applied to intervene in the present appeal, so that when the appeal was heard by this Court on 6th December, 1961, the appellants, the respondents and the Wakf Board were all heard and by consent, an order was passed that the appellants should be allowed to urge additional grounds in support of their appeal, these grounds being based on the registration of the trust. It was also ordered that the Wakf Board be permitted to be added as a party to the appeal, and that all the parties should be permitted to file additional statements in the case within the time specified. When the parties obtained this order by consent, it was understood that they would make the necessary application to the Andhra High Court for adjournment of the hearing of the Writ Petition No. 791 of 1961, filed by respondent No. 2, pending the decision of the appeal in this Court. The result of this consent order is that all the points of dispute between the parties would be decided by this Court and so, the final decision of this Court would govern the decision of the Writ Petition filed by respondent No. 2 in the Andhra High Court against the Wakf Board. In pursuance of the said consent order, the appeal has now come before us for final disposal.

It is common ground that if the trust is held to be a wakf within the meaning of the relevant provisions of the Wakf Act and its registration under section 28 is found to be valid, the impugned Regulation and the Rules framed thereunder would be inapplicable to the said trust and so, in that event, the appeal would have to be allowed. If, on the other hand, it is held that the trust is not a wakf and that the provisions of the Wakf Act are inapplicable to it, then its registration under section 28 of the said Act would be invalid, and the contentions which the appellants initially wanted to raise in their appeal would fall to be considered. That is why, logically, the first point to consider in this altered situation would be whether the Wakf Board was justified in registering the trust under section 28 of the Wakf Act (hereinafter called the Act); and that takes us first to consider the nature of the wakf to which the Act applies.

The Act was passed in 1954 for the better administration and supervision of wakfs. Section 3 (1) defines a wakf as meaning a permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes :—

- (i) a wakf by user ;
- (ii) mashrut-ul-khidmat ; and

(iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious, or charitable ; and "wakif" means any person making such dedication. Consistently with this definition of "wakf", a "beneficiary" has been defined by section 3 (a) as meaning a person or object for whose benefit a wakf is created and it includes religious, pious and charitable objects and any other objects of public utility established for the benefit of the Muslim community. It is thus clear that the purpose for which a wakf can be created must be one which is recognised by Muslim law as pious, religious, or charitable, and the objects of public utility which may constitute beneficiaries under the wakf must be objects for the benefit of the Muslim community. Naturally, the wakf contemplated by the Act can be either "Shia wakf" or "Sunni wakf" ; Shia wakf meaning a wakf governed by Shia law (section 3 (j) and Sunni wakf meaning a wakf governed by Sunni law (section 3 (k)). This broad division of wakfs into two categories is reflected in other provisions of the Act. Section 4 (3) provides, *inter alia*, that the Commissioner shall, after making such enquiry as he may consider necessary, submit his report to the State Government containing the specified particulars—amongst them is the particular in regard to the number of wakfs in the State, showing the Shia wakfs and Sunni wakfs separately. It would thus be clear that the preliminary survey of wakfs contemplated by section 4 is intended to collect data about the wakfs in the State to divide them into Shia wakfs and Sunni wakfs separately. Then in regard to the appointment of the members of the Board with which section 11 deals, the Proviso to the said section lays down that in determining the number of Sunni members or Shia members in the Board, the State Government shall have regard to the number and value of Sunni wakfs and Shia wakfs to be administered by the Board. Section 6 provides for the settlement of a dispute in regard to the question as to whether a wakf is a Shia wakf or a Sunni wakf and section 15 which deals with the functions of the Board has an explanation which provides that the powers of the Board shall be exercised,—

(i) in the case of a Sunni wakf, by the Sunni members of the Board only ; and

(ii) in the case of a Shia wakf, by the Shia members of the Board only. It is thus clear that the wakf contemplated by the Act can be either a Shia wakf or a Sunni wakf and the provisions with regard to the management of the wakf are accordingly made on that basis.

The Muslim character of the wakf is also emphatically brought out by certain other provisions of the Act. The Proviso to section 15 (1), for instance, requires that in exercising its powers under the Act in respect of any wakf, the Board shall act in conformity with the directions of the wakif, the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim law. Similarly, section 15 (2) (j) lays down that the Board has power to sanction leases of property for more than three years or mortgage or exchange of properties according to the provisions of Muslim law. Section 21 requires that there shall be a Secretary to the Board who shall be a Muslim and he shall be appointed by the State Government in consultation with the Board ; and section 13 provides that a person shall be disqualified for being appointed a member of the Board if he is not a Muslim. There can, therefore, be no doubt that the wakfs with which the Act deals are trusts which are treated as wakfs under the definition of section 3 (1) and as such, a trust which does not satisfy the tests prescribed by the said definition would be outside the Act. This position is not disputed.

At this stage, it is necessary to distinguish between wakfs recognised by Muslim law and religious endowments recognised by Hindu Law on the one hand and public charitable trusts as contemplated by the English law on the other. This question has been considered by the Privy Council in *Vidya Varuthi Thirtha v. Balusami Ayyar & others*¹. Mr. Ameer Ali who delivered the judgment of the Board observed that ;

1. 41 M.L.J. 346 : L.R. 48 I.A. 302 : I.L.R. 44 Mad. 831.

"it is to be remembered that a 'trust' in the sense in which the expression is used in English law, is unknown to the Hindu system, pure and simple. Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system; to Brahmins, Goswamis, Sanyasis, etc..... When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager or custodian of the idol or the institution.....In no case is the property conveyed to or vested in him, nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration." (p. 311).

Thus, these observations show that the basic concept of a religious endowment under Hindu Law differs in essential particulars from the concept of trust known to English Law.

Similarly, the Muslim law relating to trusts differs fundamentally from the English law. According to Mr. Ameer Ali,

"the Mohammadan law owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'. As a result of the creation of a wakf, the right of wakf is extinguished and the ownership is transferred to the Almighty. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. But in that capacity, he has no right in the property belonging to the wakf; the property is not vested in him and he is not a trustee in the legal sense."

Therefore, there is no doubt that the wakf to which the Act applies is, in essential features, different from the trust as is known to English law.

Having noticed this broad distinction between the wakf and the secular trust of a public and religious character, it is necessary to add that under Muslim law, there is no prohibition against the creation of a trust of the latter kind. Usually, followers of Islam would naturally prefer to dedicate their property to the Almighty and create a wakf in the conventional Mahommedan sense. But that is not to say that the follower of Islam is precluded from creating a public, religious or charitable trust which does not conform to the conventional notion of a wakf and which purports to create a public religious charity in a non-religious secular sense. This position is not in dispute. Therefore, the main question which calls for our decision is: Is the trust executed by the Nizam a wakf to which the provisions of the Act apply or is it a public charitable trust falling outside the said Act? and the decision of this question would obviously depend upon the construction of the document by which the trust is created and it is to that problem that we will now turn.

In construing the document by which the trust is created by the Nizam, it is necessary to read its material portion. Clauses 1 to 4 are relevant for our purpose:—

"This indenture made at Hyderabad the 14th day of June, 1954 between His Exalted Highness Nawab Sir Osman Ali Khan Bahadur, G.C.S.I., C.B.E., The Nizam of Hyderabad and Berar (hereinafter called 'the settlor' which expression shall unless repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators) of the one part and Nawab Zain Yar Jung Bahadur of Hyderabad, Muslim, inhabitant and Vapal Pangunni Menon of Bangalore, Hindu, inhabitant (hereinafter called 'the Trustees' which expression shall unless repugnant to the context or meaning thereof be deemed to include the survivors or survivor of them and the Trustees for the time being of these presents and the heirs, executors and administrators of the last surviving Trustee their or his assigns) of the other part:

Whereas the Settlor has prior to the execution of these presents, made full and ample provisions for the several members of his family which enable them to maintain themselves in comfort in accordance with and benefiting the station of life in which Providence has placed them and the Settlor has fulfilled his duty as the head of the family towards them so that with the help of God Almighty they will be able to live in reasonable comfort even in the altered conditions existing in the present times;

And whereas in so doing the Settlor has parted with a large portion of his wealth and assets;

And whereas the Settlor feels that he should now devote and dedicate a substantial part of his remaining assets for being utilised for the relief of the poor particularly in the State of Hyderabad and for the maintenance of religious institutions, particularly in the State of Hyderabad and for the advancement of education and for other charitable purposes without distinction of religion, caste or creed;

And whereas in view of the deteriorating economic conditions particularly in the State of Hyderabad the need to help the poor and the indigent is much greater now than before and the Settlor is therefore desirous of making Charitable trust of the shares, securities and moneys particularly described in the schedule hereunder written (including all the rights incidental or attached to his holding thereof) of which he is at present the sole owner;

And whereas the Trustees have agreed to become the first Trustees of those presents as is testified by their being parties to and executing these presents ;

And whereas the sum of Rs. 88,490 (Rupees eighty-eight thousand four hundred and ninety only mentioned in the schedule hereunder written has been paid by the Settlor to the Trustees by a cheque drawn in their favour this day before the execution of these presents.

Now this Indenture witnesseth as follows :

1. For effecting his said desire and in consideration of the promises the Settlor doth hereby declare that he has, prior to the execution of these presents, paid and transferred and he doth hereby confirm such payment and transfer unto the Trustees of all that the said sum of Rs. 88,490 (rupees eighty-eight thousand four hundred and ninety only) included in the schedule hereunder written and further the Settlor doth hereby assign and transfer unto the Trustees all those shares and securities described in the schedule hereunder written together with all the rights of the Settlor incidental or attached to his holding of the the said shares and securities and all the estate right, title and interest, property, claim and demand whatsoever at law and in equity of the Settlor of, in and to the said moneys, shares and securities and every part thereof 'to have and to hold receive and take' all and singular the said moneys shares and securities described in the schedule hereunder written unto the Trustees for ever upon the Trusts and with and subject to the powers, provisions, agreements and declarations hereinafter appearing and contained of and concerning the same.

2. The Trustees do hereby declare that they, the Trustees shall hold and stand possessed of the said shares, securities and moneys described in the schedule hereunder written and all the rights incidental or attached to the holding of the said shares and securities by the Settlor (all which are hereinafter for brevity's sake referred to as 'the Trust Fund' which expression shall also include cash and any other property and investments of any kind whatsoever into which the same or any part thereof might be converted, invested or varied from time to time or such as may be acquired by the Trustees or come to their hands by virtue of these presents or by operation of law or otherwise howsoever in relation to these presents) upon the Trusts and with and subject to the powers, provisions, agreements and declarations hereinafter declared and contained of and concerning the same.

3. The trustees shall hold and stand possessed of the Trust Fund upon the following Trusts:

(a) To manage the Trust Fund and collect and recover the interest, dividends and other income thereof;

(b) To pay and discharge out of the income of the Trust Fund all expenses and charges for collecting and recovering the income of Trust Fund and the remuneration of the Trustees payable under these presents and all other costs, charges and expenses and outgoings of and incidental to the trusts created by these presents and the administration thereof;

(c) To pay or utilise the balance of such interest dividends and other income of the Trust Fund (hereafter called 'the net income of the Trust Fund') and if the Trustees so desire the corpus of the Trust or any part of the corpus for all or any one or more of the following charitable purposes in such shares and proportions and in such manner in all respects as the Trustees shall in their absolute discretion think fit, that is to say—

(i) for the relief of the poor, particularly in the State of Hyderabad (Deccan) including the establishment, maintenance and support of institutions or funds for the relief of any form of poverty,

(ii) for the maintenance, upkeep and support of public religious institutions, and otherwise for the advancement of religion particularly in the State of Hyderabad (Deccan) To The Intent that the benefit of the present clause shall not be restricted to any particular religion,

(iii) for the advancement and propagation of education and learning, particularly among the inhabitants of the State of Hyderabad (Deccan), including the establishment, maintenance and support of colleges, schools or other educational institutions, professorships, lectureships, scholarships and prizes, particularly for the benefit of the inhabitants of the State of Hyderabad (Deccan),

(iv) for giving medical aid and relief, particularly to the inhabitants of the State of Hyderabad (Deccan), including the establishment, maintenance and support of institutions or funds for medical aid and relief, and

(v) for the advancement of any other object of general public utility, particularly in the State of Hyderabad (Deccan).

4. The trust and charity hereby created shall be called 'H.E.H. the Nizam's Charitable Trust'.

5. * * * * *

It is urged by Mr. Pathak who appeared for the Board that the significant feature of the document is the desire of the Settlor to devote and dedicate a substantial part of his remaining assets for being utilised for religious purposes, and that is the distinguishing feature of wakfs. His argument is that in dealing with the character of the trust created by the document, we should not attach importance to the words like the "Settlor" and the "Trustees" because words are a mere matter of form and the character of the document must be judged from the substance of its provisions and not their form. The intention of the document is the desire

of the settlor to dedicate the property which is its subject-matter to purposes recognised as charitable by Muslim law and so, though the appellants are described as Trustees and though there are certain expressions showing that the property has vested in them, we should not lose sight of the basic concept which actuated the settlor in executing the document and that concept is one of dedication on which wakfs are based.

It is also urged that the effect of clauses relating to the vesting of the property in the appellants as Trustees should be judged in the light of the character of the property with which the document deals. The subject-matter of the trust is movable property and unless the said property was assigned to the appellants, they would not have been able to deal with it, and that alone is the basis and the justification for the vesting provisions in the document. Therefore, too much importance should not be attached to the said provisions and it should not be held that since there is a vesting of legal title in the appellants, the transaction is a trust and not a wakf. The pervading idea of the document is the dedication of the property to purposes recognised by Muslim law as valid for a wakf and it is only as a means to give effect to that idea that the property has been vested in the appellants. That, in brief, is the main argument in support of the plea that the trust is a wakf to which the provisions of the Act apply.

On the other hand, there are certain other broad features of the transaction which are wholly inconsistent with the notions of a wakf. The outstanding impression which the document creates is that the settlor wanted to create a trust for charitable purposes and objects in a secular and comprehensive sense, unfettered and unrestricted by the religious considerations which govern the creation of wakf. Even the clause on which Mr. Pathak relies for the purpose of showing the intention to dedicate the property to Almighty makes it perfectly clear that amongst the objects for which the trust was created were included other charitable purposes without distinction of religion, caste or creed, and that obviously transgresses the limits prescribed by the requirements of a valid wakf. The same comprehensive character of the charitable purpose which the settlor has in mind is equally emphatically brought out by clause 3 (c) (ii). Clause 3 provides that the Trustees shall hold and stand possessed of the Trust Fund upon the Trusts specified in sub-clauses (a) to (c). Sub-clause (c) (ii) refers to the maintenance, upkeep and support of public religious institutions, and otherwise for the advancement of religion, particularly in the state of Hyderabad; and it adds that the benefit of the present clause shall not be restricted to any particular religion. A public charitable purpose which is not limited by considerations pertaining to one religion or another could not have been more eloquently expressed. The dominant intention of the settlor in creating the trust was to help public charity in the best sense of the words, "public charity" not confined to any caste, religion or creed; and it is in that sense that the religious institutions which are within the purview of the trust are all religious institutions not confined to any particular religion. Then look at clause 3 (c) (v). It provides that the trust property can be utilised for the advancement of any other object of general public utility, particularly in the State of Hyderabad. It is true that the settlor wanted the objects of general public utility in Hyderabad to be preferred and in that sense the document discloses a desire to prefer the objects of general public utility situated within the territorial limits of Hyderabad. But it is plain that it was farthest from the mind of the settlor to impose a limitation that the objects of general public utility should be confined to those recognised as such by Muslim law. It is thus clear that the outstanding feature of the trust disclosed by these provisions is plainly inconsistent with the concept of a wakf and that itself would rule out the view that the document creates a wakf and not a comprehensive public charitable trust.

It is true that a large number of provisions contained in the document are consistent with the view that the document creates a wakf as much as they are

consistent with view that it creates a public charitable trust as distinguished from wakf. It is, however, patent that there are some clauses which are inconsistent with the first view, whereas with the latter view all the clauses are consistent. In other words, if the construction for which the Board contends is accepted, some clauses would be defeated, whereas if the construction for which the respondents contend is upheld, all the clauses in the document become effective. In our opinion, it is an elementary rule of construction that if two constructions are reasonably possible, the one which gives effect to all the clauses of the document must be preferred to that which defeats some of its clauses. It is not in dispute that if the document is held to be a wakf, the directions in the document that charitable purposes should be selected without distinction of religion, caste or creed, would obviously be defeated and that undoubtedly supports the conclusion that the document evidences a public charitable trust and not a wakf.

Besides, the clause on which the argument of dedication is based cannot be divorced from the provision contained in the said clause which provides for charitable purposes without distinction of religion, caste or creed and so, the intention of the settlor was to help not only charities which would fall within the definition of a wakf but also charities which would be outside the definition ; and so, the whole argument of dedication breaks down because the idea of dedication is not confined to purposes which are recognised as charitable by the definition of the Act but extends far beyond its narrow limits. In this connection, it may be relevant to recall that it would be competent to the Trustees to devote a substantial part of the income, and may be even the whole of the income, to a purpose which may be outside the limits of wakf by virtue of their powers under clause 3 (c) of the document, and that plainly suggests that the vision of the settlor was not confined to the narrow limits prescribed by the conditions as to a valid wakf.

It is in this context that the other provisions about vesting must be considered. The document calls the author of the trust as the "Settlor" and the appellants as the "Trustees" and that introduces the concept of the Trust as contemplated by English Law. Clause 1 of the document specifically assigns and transfers unto the appellants all those shares and securities described in the schedule which are the subject-matter of the trust. This clause, in terms, transfers the shares and securities to the Trustees and so, the legal title in respect of the subject-matter of the trust vests in the Trustees. The argument that the provision for vesting had to be made because the property in question is movable property, does not carry conviction because the whole scheme of the document appears to be to vest the title in the Trustees and gives them absolute discretion to use the said property and its income for any of the charitable purposes specified in the document. Thus, the vesting provision has not been adopted as a means to carry out the intention to dedicate the property to the Almighty but it constitutes the essential basis of the transaction and that is to transfer the legal title of the trust property to the Trustees. In that sense, clause 14 which confers on the Trustees absolute discretion to deal with the property in any manner they like, as well as clauses 18 and 24 which clothed them with authority to employ servants in their uncontrolled discretion and to appoint a Committee for management of the Trust, become more easily intelligible. In this connection, we may also notice the fact that the appointment of non-Muslims as Trustees which is prohibited by the Act, is an indication that the Settlor did not regard the trust as falling within the said statutory prohibition ; likewise, the scheme of management of the trust which the Trustees are given liberty to adopt in administering the trust, is completely free from the regulations based on Muslim law which the relevant sections of the Act have prescribed. These several features of the trust support the conclusion that the trust is not a wakf and does not fall within the provisions of the Act. We have carefully considered all the relevant provisions of the document and we are satisfied that on a fair and reasonable construction, the document must be held to have created a trust for public charitable purposes, some of which are outside the limits of the wakf and so, the conclusion is inescapable that the trust

created is not a wakf but a secular comprehensive public charitable trust. In that view of the matter, section 3 (1) of the Act cannot apply to the trust and its registration under section 28 is invalid and inoperative.

K.S.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. Hidayatullah and J. C. SHAH, JJ.

Gambhir Mal Pandiya (since deceased) and after him his heirs and legal representatives and others

.. *Appellants**

v.

J. K. Jute Mills Co., Ltd., Kanpur and another

.. *Respondents.*

Civil Procedure Code (V of 1908), Order 30 and Order 21, Rule 50—Decree against the firm—Execution against partner not served in the suit—Defences open to the partner not served—What are—Liability of such partner—Extent of.

Order 30 of the Code permits suits to be brought against firms. The summons may be issued against the firm or against persons who are alleged to be partners individually. The suit, however, proceeds only against the firm. Any person who is summoned can appear, and prove that he is not a partner and never was ; but if he raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but not enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are (1) persons who appeared in answer to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but rule 50 (2) of Order 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the person summoned to reopen the decree. He can only prove that he was not a partner, and in a proper case, that the decree is the result of collusion, fraud or the like. But, he cannot claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and has no special defence of collusion, fraud, etc., the Court must give leave forthwith.

Appeal from the Judgment and Decree dated the 25th September, 1957, of the Allahabad High Court, in Civil Revision No. 815 of 1955.

M. C. Setalvad, Attorney-General for India (*B. P. Maheshwari*, Advocate, with him), for Appellants.

S. M. Sikri, Advocate-General for the State of Punjab (*K. P. Gupta*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal on a certificate granted by the High Court of Allahabad against an order dated 25th September, 1957, dismissing a Revision Petition filed by the present appellant.

The facts of the case are very simple. Messrs. J. K. Jute Mills Co., Ltd. (the answering respondents), entered into a contract with a firm, Messrs. Birdhi Chand Sumer Mal, for the supply of certain articles. The contract was entered into by one Seth Tikam Chand, a partner in the firm. One of the terms of the contract was that in a case of a dispute between the parties, it would be referred to the Merchants Chamber of Commerce, Kanpur, for arbitration. It appears that a dispute arose, which was referred to the Chamber of Commerce, and an award in favour of the Mills was given on 8th January, 1947. Two years later, the award was made into a rule of the Court, and a decree followed in favour of the Mills. The firm of Birdhi Chand Sumer Mal consisted of two partners ; the other partner was one Mr. Pandiya, the predecessor-in-interest of Seth Gambhir Mal Pandiya, the appellant. In execution of the decree passed against the firm, the Mills wished to proceed against the personal property of Mr. Pandiya, and filed an application for the leave of the Court under Order 21, rule 50 (2) of the Code of Civil Procedure.

In answer to the notice which was issued, the appellant, Seth Gambir Mal Pandiya appeared and raised objections. He contended that he had not been served in the proceedings relating to the arbitration; nor of the making and the filing of the award in Court. He also contended that Seth Tikam Chand, who had signed the contract containing the arbitration clause with the Mills, had no authority to enter into an agreement containing such a clause or to refer the dispute to arbitration on behalf of the other partner. He, therefore, maintained that the award was not binding on him.

The contentions of the appellant were not accepted by the First Civil Judge, Kanpur, who allowed the application of the Mills and granted them leave under the rule. The appellant then filed an application for Revision in the High Court of Allahabad, which was heard by C. B. Agarwala and Beg, JJ. Agarwala, J., held that although the decree passed against the firm was to be deemed to have been passed against all the individual partners thereof, it was binding *proprio vigore* only against the partnership property and personally against those persons, who are mentioned in clauses (b) and (c) of rule 50 (1), Order 21, and that the decree was not binding against the appellant, who had not been served in the suit and would be binding only when a summons was served upon him to appear under sub-rule (2) and his liability was determined. The reason given by the learned Judge was that a person who was not served in the suit could question his personal liability under the decree, even though he admitted himself to be a partner, upon any ground which was open to him if he had been served in the suit, and that such a person could raise the objection that as the decree was the result of an award which was based upon an agreement of reference to arbitration to which he was not a party, he was not personally liable under the decree. Beg, J., on the other hand, held that inasmuch as the appellant admitted that he was a partner in the firm of Birdhi Chand Sumer Mal, he was not entitled to raise any objection either to the contract or the reference to arbitration or the award. The learned Judges having disagreed about the interpretation to be placed on sub-rule (2) of rule 50, the case was laid before Mukherji, J. He agreed with the conclusion of Beg, J., and in accordance with his opinion, the application for Revision was dismissed. The Divisional Bench, however, certified the case as fit for appeal to this Court, and the present appeal has been filed.

Order 21, rule 50 of the Code of Civil Procedure reads as follows:—

“50. (1) Where a decree has been passed against a firm, execution may be granted—

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order 30 or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein, unless he has been served with a summons to appear and answer.”

This rule deals with the execution of decrees obtained against firms. It enables the decree to be executed against the partnership assets. It also enables that the decree may be executed against any one who appeared in the suit, and admitted

that he was a partner or who was lawfully adjudged in the suit to be one. It also enables that the decree may be executed against any person lawfully summoned in the suit as a partner but who did not choose to appear individually to defend the action. Lastly, it provides that if it is desired to execute the decree against a person as being a partner of the firm who does not belong to the categories already mentioned, then the leave of the Court must be obtained and the Court before granting such leave should summon that person whose liability, unless he admits it, should be tried as an issue. So far, the matter is quite simple. The difficulty appears only when one begins to give a meaning to the expression "the liability of such person", and this raises the question: what kind of defences are open to such a person? The learned Attorney-General has argued that the expression admits of a narrow construction, a wide construction and a construction which is in between the two. The narrow construction, according to him, is that the only issue to be tried is whether that person was a partner or held himself out to be one. The wide construction, according to him, is that the issue may take in all defences open to the partnership not raised in the suit and also all defences personal to that person to avoid his individual liability. Under the middle view, according to him, the Court is to try an issue relating to the personal liability of that person. On the other hand, the learned Advocate-General of the Punjab, who appeared for the respondent Company, contends that if the person summoned, admits that he is a partner, there is nothing further to try, and execution can issue against him individually without trying any other issue he may wish to raise. This contention as raised by the learned Advocate-General prevailed in the Allahabad High Court, while the contention of the learned Attorney-General was accepted by Agarwala, J.

Order 21, rule 50 (2) of the Code deals with executions, but really is a part of the provisions relating to suits against firms. Those provisions are contained in Order 30 of the Code, and must be viewed alongside to get the true meaning of the words. Order 30 and the provisions of rule 50 of Order 21 were taken from Order XLVIII-A of the Rules of the Supreme Court in England. Though there are slight variations in language, the provisions of our Code are in *pari materia* with the provisions of the Rules of the Supreme Court, as amended in 1891. Under common law, an action against firms was not known. All actions had to be brought against the partners individually. After the Judicature Acts, rules were framed in 1883, which enabled actions to be brought against firms in the names of the firms.

The rules provided forms for appearances by persons who entered appearances in answer to summons lawfully issued; but the later rules which are more exhaustive, though they do not dispense with the forms of appearance, prescribe how the presence of the firm and of individual partners is to be secured and how defences are to be raised. It is not necessary to reproduce the English rules. They are to be found in the Annual Practice, Vol. I, page 1151 (1962). The rules of 1891 are almost reproduced as Order 30 and Order 21, rule 50 of the Code of Civil Procedure. Order 30 deals with procedure in suits against firms in the firm name, and Order 21, rule 50, with the execution of decrees obtained against firms. These provisions are in themselves a Code. To understand the meaning of rule 50 (Order 21), one must first consider the provisions of Order 30, which contains ten rules. The first rule enables a plaintiff to sue in the name of the firm, two or more persons liable as partners, or of which they were partners when the cause of action accrued; and the plaintiff may also apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accrual of the cause of action, partners in such firm. The rule also permits the signing of the written statement and the verification by one partner only. The second rule enables the defendant to ask for the disclosure of the names of partners, where a firm sues as a plaintiff. The third rule then provides for service of summons upon the firm and the partners. Such summons may be served, as the Court may direct:

(a) upon all or any of the partners; or

(b) upon any person having control or management of the business, at the principal place of business of the firm within India.

A service upon the firm is deemed to be good service, whether all or any of the partners are within or without India. But if the firm is dissolved to the knowledge of the plaintiff, the summons must be served on every person within India whom it is sought to make liable. The fourth rule provides for right of suit on death of partner. We are not concerned with that eventuality. The fifth rule then provides that where the summons is issued to a firm under rule 3, every person served shall be informed by notice whether he is served as a partner or as a person having the control and management of the business or both; but in the absence of notice, the person is deemed to be served as a partner. Rule 6 lays down that persons served as partners in the name of the firm shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. Rule 7 then says that if a notice is served upon a person having the control or management of the partnership business, he need not appear unless he is a partner. Rule 8 enables a person served as a partner to appear under protest denying that he is a partner, but the appearance does not preclude the plaintiff from serving a summons on the firm and obtain an *ex parte* decree, if no other partner appears. The remaining rules do not concern us in this case.

From the above analysis, it is clear that a plaintiff need sue only the firm, but if he wants to bind the partners individually he must serve them personally, for which purpose he can get a discovery of the names of partners of the firm. Persons served individually may appear and file written statements, but the proceedings go on against the firm only. They may, however, appear and plead that they are not partners or were not partners when the cause of action arose. But even if no other partner appears, there may be a decree against the firm if the firm has been served with the summons. The gist of Order 30 thus is that the action proceeds against the firm, and the defence to the action by persons admitting that they are partners is on behalf of the firm. Persons sued as partners may, however, appear and seek to establish that they are not partners or were not partners when the cause of action arose; but if they raise this special plea, they cannot defend the firm. This was laid down in connection with the analogous provisions of the English rule in *Weir & Co. v. McVicar & Co.*¹. Partners appearing and admitting their positions as partners can only defend the firm, because the suit continues in the firm's name. The law is thus not concerned with a fight between the partners *inter se*, and an action between the partners is not to be tried within the action between the firm and the plaintiff. Of course, the partners who admit that they are partners need not raise a common defence. They may raise inconsistent defences, but all such defences must be directed to defend the firm and the plaintiff must surmount all such defences. See *Ellis v. Wadeson*². The purport of the rules as well as the two English cases which have correctly analysed the rules on the subject (the English and the Indian rules being alike) is that the partnership is sued as a partnership, and though the partners may put in separate defences, those defences must be on behalf of the firm. If some of the partners do not appear, those that do, must defend the firm; but if no proper defence is raised by them, the plaintiff cannot be deprived of a judgment. The judgment and decree thus obtained are executable against the partnership assets. This brings in the provisions of Order 21, rule 50 of the Code.

That rule enables a decree obtained against a partnership firm to be executed against the property of the partnership. Next, it enables the decree to be executed individually against a person who appeared in his own name under rule 6 or rule 7 of Order 30 or who admitted on the record or was adjudged to be a partner. Next, the decree can be executed against any person who is served individually as a partner but has failed to appear. Next, it permits the decree to be executed with the leave

1. L.R. (1925) 2 K.B. 127.

2. L.R. (1889) 1 Q.B.D. 714.

of the Court against persons belonging to the category of the persons above mentioned, provided that they are summoned and either admit their liability or after an issue is tried, their liability is determined.

A large number of cases decided in India and England have laid down the kind of issue which may be tried under Order 21, rule 50 (2) of the Code and the cognate provisions of the English rules. Since the English cases are first in point of time, we shall begin with them. It must be remembered in this connection that the English rules prescribed forms for recording appearance by persons summoned in actions against firms. These are to be found in the Annual Practice, Vol. I (1962), at page 1160 and are six in number :

- (1) A.B., a partner in the firm of Brown & Co.
- (2) A. B., a partner in the firm of Brown, Evans & Co., sued as Brown & Co.
- (3) A. B., a partner in the firm of Brown & Co., at the time the alleged cause of action arose.
- (4) A. B. served as a partner but who denies that he was a partner in the above named firm at any time.
- (5) A. B. served as a partner in the firm but who denies that he was a partner at the time of the accruing of the alleged cause of action.
- (6) A person appears subsequently and desires to appear as a partner.

These forms are appropriate to an action, but they are also used for persons summoned under Order XLVIII-A, rule 8, corresponding to our Order 21, rule 50 (2).

In *Jackson v. Litchfield*¹, which was decided prior to the rules of 1891, the writ was issued against a firm in the firm name. It was held that the judgment must be entered against the firm, but it could not be entered separately against an individual member of the firm who made default in appearing in the action. The decision thus was that if the action was against the firm, the judgment should be against the firm. In *Munster v. Cox*², the writ was against R & Co. The appearance was "R trading as R & Co." Judgment was by consent. Later, the judgment was sought to be executed against one Cox who was not summoned, and for this purpose, application was made for striking out the words "R sued as" from the appearance recorded. This was disallowed. On appeal Selborne, L.C. dealing with the former Order XLII, rule 8 (corresponding to Order 21, rule 50 (2)), observed as follows :

"If execution was sought against any other person as being a member of the firm, then the Court was to exercise its discretion as to whether it would allow execution to issue or not, and upon what terms, and, as justice seemed to require, might let in the party sought to be affected by the judgment to the benefit of a defence, not indeed by trying the action over again, but by giving him, as against the application to make him answerable, the benefit of any defence which he might have had if he had been made a party on the record or had had notice of the proceeding, so as to relieve him from the risk of suffering by the collusion or the improper defence of his co-partner."

This would show that the defences which the person summoned to answer an execution application can raise are the defences open to him if he had been summoned in the suit. If he denies that he is or was a partner when the cause of action arose, the issue to be tried would be only that. If he admits that he is or was a partner at the material time he can defend on the ground that the decree was the result of collusion, fraud or the like.

In *Ellis v. Wadeson*³, an action was brought against a firm in the firm name. There were two partners, one of whom died after the writ and appearance. The surviving partner put in a defence not on behalf of the firm but a personal defence to the action, but this was disallowed. It was pointed out that if a partner is not served and is ignorant of the action, execution cannot be levied against him unless he is given an opportunity and the plaintiff must establish his liability as a partner of the firm but the plaintiff is not required to meet a defence of a personal character.

Again, in *Davis v. Hyman & Co.*⁴, in an action against a firm, only one person entered appearance, and judgment was entered against the firm. When the plaintiff

1. L.R. (1882) 8 Q.B.D. 474.

2. (1895) L.R. 10 App. Cas. 680.

3. L.R. (1889) 1 Q.B.D. 714.

4. L.R. (1903) 1 K.B. 854.

applied for a summons against another person under Order XLVIII-A, rule 8 (Order 21, rule 50 (2)) the issue to be framed by the Master was :

"Whether the said *S. M. H.* was or has held himself out as a partner in the defendant firm."

Phillimore, J., modified the issue to read :

"Whether *S. M. H.* was at the date the bill of exchange sued on was given or at the date when the goods were supplied, a member of the defendant firm of Hyman & Co."

The Court of Appeal vacated the order of Phillimore, J. Stirling, L.J., observed—

"Here we have a person who is alleged to be liable as a member of the defendant firm, and the only question which requires solution is whether his liability arises from his being a member of the firm or from his having held himself out as a partner....."

It is suggested that, if this form of order is adopted, the defendant in the issue might be deprived of some defence that he might have had if he had been served with the writ and had an opportunity of appearing in the action. As to this I would say that under the rule the question to be determined is the general one of the liability, as a member of the firm, of the person sought to be charged, and it seems to me that an issue could, in a proper case, be so framed as to include any proper defence. No such defence is suggested in the present case."

In *Weir & Co. v. McVicar & Co.*¹, the action was against a firm. A person who was served as a partner entered appearance under protest denying that he was a partner. It was held that he could not at the same time raise the defence of the firm nor could he insist that the issue regarding his being a partner be tried first. Scrutton, L.J., referred to the provisions of Order XLVIII-A, rule 8 (Order 21, rule 50 (2)) to compare the position in the trial of the suit and that in execution, and made the following remarks :

"..... Order XLVIII-A, rule 8 provides that an issue may be directed to try the question whether the alleged partner is in fact a partner or not. But it seems clear that in that issue he cannot raise the question of the liability of the firm, for if he could you might have two separate judgments on the same cause of action, the one already obtained for a specified amount in the action against the firm, and the other, for possibly a reduced amount or for nothing at all, on the trial of the issue under rule 8. The only question that can be raised on the trial of that issue is whether the person against whom execution is sought was a partner at the material time or not."

It was also observed in that case :

"Order XLVIII-A, rule 8, assumes that judgment has already been obtained against the firm by proper service, and then proceeds to point out who are the persons against whom it is to be enforced."

The English cases thus establish that even in an action the defences may be of two kinds—(1) a personal defence that a person summoned as a partner is not a partner and was not a partner at the time the cause of action accrued, (2) defence of the firm on the ground of collusion, fraud or the like but not a personal defence. A person who raises the first defence is precluded from raising the second and a person who admits that he is a partner can only defend the firm but not himself. These two rules apply to persons summoned as partners. Persons not summoned as partners need not appear. But their liability by that reason alone is neither enlarged nor discharged. Indeed, in our Code also, Order 21, rule 50 (4) lays down:

"Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer."

Where the person is sought to be made liable in execution, the defences he can raise, according to the English rulings above examined, are : (i) he can establish that he is not a partner or that he was not a partner when the cause of action arose, and the plaintiff can prove that he held himself out as such ; (ii) he can relieve himself against collusion and fraud of his partner. He cannot, however, raise a defence to have the action tried over again and he cannot raise a defence personal to himself as against his partner or partners.

We shall now consider the decisions of the High Courts in India. It will be found that, with the exception of one or two rulings, the same views have been expressed in India also. In *Jagat Chandra Battacharjee v. Gunny Hajee Ahmed*¹, a summons was served upon the firm but not upon one *K*. A decree was obtained against the firm and the decree-holder applied to execute it against the legal representatives of *K* by attaching property forming the estate of *K*. It was admitted that *K* was a partner. It was held that the assets of *K* were liable. Sanderson, C.J., held that if in an inquiry under Order 21, rule 50 (2) it were decided that a person summoned as a partner was, in fact, a partner, his liability is established. The intention of the rule is to give an opportunity to such a person to dispute this liability. Buckland, J., held that if after appearance the liability is admitted the Court may grant leave forthwith, and that it is not open to the person summoned to challenge the decree.

In *In re Malabar Forests & Rubber Co.*², Mirza, J., held that where a decree has once been passed against a firm, an individual partner who was not summoned personally, may be summoned in the execution proceedings, and can contend that he was not a partner but cannot be allowed to challenge the authority of the other partner or partners to enter the transaction in dispute. In *Bhagwan v. Hiraji*³ Patkar and Murphy, JJ., took a different view. In that case, a plea that the partners were not authorised to refer a dispute to arbitration was allowed to be raised. Reliance was placed upon the fourth sub-rule of Order 21, rule 50. In *Cooverji Varjang v. Cooverbai Nagsey*⁴, the judgment of Wadia, J., from which an appeal was taken to the Divisional Bench is printed. In that judgment, Wadia, J., held that under Order 21, rule 50 (2), the person summoned to show cause may not only prove that he was not a partner but take other defences appropriate to his own liability. The learned Judge apparently differed from Mirza, J. and preferred the view in *Bhagwan v. Hiraji*³, and pointed out that the view was accepted in *In re Tolaram Nathmull*⁵ and *Chhatoo Lal Misser & Co. v. Naraindas Baijnath Prasad*⁶. In the last mentioned case, two defences were raised—(1) that the person summoned was not a partner, and (2) that the decree could not be personally executed against him as he was a ward under the U.P. Court of Wards Act. The second plea was one of a special protection under law, and the case is thus distinguishable.

The Bombay view has, however, changed in recent years. In *Rana Harkishandas v. Rana Gulabdas*⁷, Gajendragadkar, and Gokhale, JJ., dissented from *Bhagwan v. Hiraji*³ and laid down that in an enquiry contemplated under Order 21, rule 50 (2) the only question that can be gone into is whether the person summoned as a partner to show cause was a partner at the material time or not. The learned Judges observed that unless the plea on this point by the person summoned to show cause succeeded, leave could not be withheld. According to the learned Judges, "liability" in sub-rule (2) of rule 50 means liability as a partner. They relied upon the decision of the Calcutta High Court in *C.M. Shahani v. Haverro Trading Co.*⁸, in which Das, J. (as he then was) and on appeal Mc Nair and Gentle, JJ., had taken the same view and had dissented from the earlier Calcutta view. *Rana Harkishandas's case*⁷, was followed by another Division Bench of the Bombay High Court in *Maharanee Mandalsakumari Devi v. M. Ramnarain Private Ltd.*⁹. A similar view was earlier expressed by the Madras High Court in *Kuppuswami v. Polite Pictures*.¹⁰

In our judgment, the view expressed in these later cases is the correct one. As we have pointed out, Order 30 of the Code permits suits to be brought against firms. The summons may be issued against the firm or against persons who are alleged to be partners individually. The suit, however, proceeds only against

1. (1926) I.L.R. 53 Cal. 214.
2. A.I.R. 1932 Bom. 334.
3. A.I.R. 1932 Bom. 516.
4. A.I.R. 1940 Bom. 330.
5. I.L.R. (1939) 2 Cal. 312.
6. (1928) I.L.R. 56 Cal. 704.

7. I.L.R. (1956) Bom. 193.
8. (1944) 51 C.W.N. 488.
9. I.L.R. (1959) Bom. 1468.
10. (1955) 1 M.L.J. 172; I.L.R. (1955) Mad. 1106.

the firm. Any person who is summoned can appear, and prove that he is not a partner and never was; but if he raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but not enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are (1) persons who appeared in answer to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but rule 50 (2) of Order 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the person summoned to reopen the decree. He can only prove that he was not a partner, and in a proper case, that the decree is the result of collusion, fraud or the like. But, he cannot claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and has no special defence of collusion, fraud, etc., the Court must give leave forthwith.

In our opinion, of the three constructions suggested by the learned Attorney-General, the widest meaning cannot be attributed to the word "liability". The proper meaning thus is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm, when the cause of action accrued, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or to raise issues between himself and his other partners. It is to be remembered that the leave that is sought is in respect of execution against the personal property of such partner and the leave that is granted or refused affects only such property and not the property of the firm. Ordinarily, when the person summoned admits that he is a partner, leave would be granted, unless he alleges collusion, fraud or the like. No such question has been raised in this case and the decision given by the High Court cannot be disturbed.

The appeal fails, and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B.P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR AND T. L. VENKATARAMA AYYAR, JJ.

M/s. Tulsi Das Khimji

.. *Appellants**

v.

The Workmen

.. *Respondents.*

Industrial Dispute—Bonus—Computation of profits for determining—Deduction of notional income-tax payable where employer is a firm—Customary bonus—Right to—Conditions essential for.

Where the employer is a firm, for purposes of determining the bonus payable for a particular year the deduction from profits on account of income-tax has to be on a notional basis. The basis has got to be such as to be readily ascertainable, and that can only be done by making calculations on the profits of the firm itself, for the particular year. It is the partners of the firm who are the employers. It is that fact that has to be taken into account in considering the question of income-tax, even as in other matters like remuneration, etc., i.e. the amount of tax payable by each partner *qua* the business of the firm, irrespective of their other sources of income or loss, because notional is quite different from the actual, though not wholly dissociated from it. It would not be right to give the employers the double benefit of granting deduction on the basis of income-tax payable by each partner in respect of his share in the profits of the firm and at the same time adding the "registered firm tax" which is paid by the firm in order to obtain certain reliefs under the Income-tax Act, which they would not otherwise have obtained.

What is more important to negative a plea for customary bonus would be proof that it was made *ex gratia*, and accepted as such or that it was unconnected with any such occasion like a festival. It cannot be accepted that to establish the claim to customary bonus it must be proved that even in years of loss such bonus was paid to the workmen. That is only one of the circumstances to be considered and not a condition precedent.

Per *Rajagopala Ayyangar, J.*—Subject to the rebate allowed under section 14 (2) (a) of the Income-tax Act the amount of "registered firm tax" payable by the firm should be added to the notional tax payable by the partners individually in respect of their share of profits and that sum must be deducted in computing the profits for ascertaining bonus payable.

There must be an earlier year in which customary bonus was paid in such circumstances as to serve as a precedent for the future, *i.e.*, to establish the custom for payment in later years. Where there has been adequacy of profits in all earlier years to justify payment of a month's bonus during Diwali it cannot be said that a right to customary bonus is established."

Appeal by Special Leave from the Award dated the 10th May, 1961, of the Central Government's Additional Industrial Tribunal, Bombay, in Reference (CGIT) No. 4 of 1960.

M. C. Setalvad, Attorney-General for India (*S. D. Vimadalal*, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Revinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellants.

C. B. Aggarwala, Senior Advocate (*K. R. Chaudhuri*, Advocate, with him), for Respondents.

The Court delivered the following Judgments

Sinha, C. J. (on behalf of the Majority)—This appeal, by Special Leave, is directed against the award dated 10th May, 1961, made by the Central Government's Additional Industrial Tribunal (*Shri Salim M. Merchant*) Bombay, in Reference No. 4 of 1960, on a reference made by the Central Government under clause (d) of sub-section (1) of section 10 of the Industrial Disputes Act (XIV of 1947). The main point in controversy between the parties relates to the question of bonus, both traditional or customary bonus and profit-sharing bonus.

The appellants are a partnership firm, registered under the Indian Partnership Act, 1932, and have their office at 46, Veer Nariman Road, Fort, Bombay-1.

The firm carries on business in the name of Messrs. Tulsidas Khimji, and for relevant year ended 31st October, 1958, the partners were (1) *Shri Karsondas Tulsidas*, (2) *Shri Ranchoddas Goculdas*, (3) *Shri Narandas Tulsidas*, (4) *Shri Moolsing Karsondas*, (5) *Shri Shantu Karsondas* and (6) *Shri Narendra Ranchhodas*. They are closely related to one another. The first two partners aforesaid have been associated with the firm for about 40 years, the third for about 35 years, the fourth for about 15 years, the fifth for about 8 years and the 6th for about 5-6 years. At all material times, the six partners had been working for and in the interest of the firm which carried on different kinds of business, namely, (1) Clearing and Forwarding Agents, (2) Godown Keepers, (3) Insurance Agents and (4) Cotton Supervisors and Controllers. For carrying on these different kinds of business, they maintained four different and distinct departments. The respondents are workmen employed under the firm. The question referred to the Tribunal was "quantum of bonus payable to workmen for the year ended 31st October, 1958." A number of issues were raised before the Tribunal, of which it is only necessary to notice the 4th and the 5th issues, which are as under :

"4. Whether the claim under reference should be restricted to a claim for profit-sharing bonus or customary bonus or on basis of implied terms of contract ?

5. Whether it is open to the workmen to claim bonus on the basis of surplus profits, and at the same time claim bonus on the ground of custom and practice or implied terms and conditions of service ? Or whether the workmen should elect the basis on which they claim bonus ?"

The Union of the workmen had claimed profit-sharing bonus at the rate of 6 months' wages (inclusive of Dearness Allowance) and traditional or customary bonus at a rate, which is not clear but which may be said to be either three months or one month's wages, plus dearness allowance, on the occasion of the *Dewali* festival. The difficulty in clearly stating the case for the workmen is that they were not clear in their own minds as to whether they were claiming the customary or traditional

bonus as one of the implied terms of their employment or for the special festival occasion of *Dewali*. It was not even clear whether the claim for 6 months' wages, inclusive of dearness allowance, was the total claim for bonus or was in addition to the traditional or customary bonus, either implied or as festival bonus on the occasion of *Dewali*. That accounts for the form of the issues set forth above. The appellants conceded only one month's basic wages as bonus which had already been paid, and contested the claim for traditional or customary bonus either as an implied term of contract of service or as a festival bonus. As there was some confusion about the claim of the respondents, the Tribunal, after referring to a number of documents and oral statements, came to the conclusion that the respondents had claimed by way of maximum bonus, 6 months' wages on a profit-sharing basis, and that the minimum was the claim for customary or traditional bonus of three months' basic wages and one month's dearness allowance. On Issue No. 4 the Tribunal decided that those were alternative claims, and that it was not necessary for the workmen to elect any one of the alternatives. The Tribunal pointed out that till the decision of this Court in the case of *The Graham Trading Co. India Ltd. v. Its Workmen*¹, a clear distinction was not made in respect of claim for bonus as an implied term or condition of service and as a customary or traditional bonus, and the respective test to determine them. The Tribunal, therefore, held that the workmen were entitled to claim bonus on each of the three alternative bases, namely, (1) Profit sharing bonus, (2) bonus as an implied term of service and (3) customary or traditional bonus on the occasion of *Dewali*. The Tribunal pointed out that the appellants had already paid to its workmen bonus equivalent to one month's basic wages which amounted to Rs. 20,780. In order to determine the question of the first kind of bonus, namely, profit-sharing bonus, the Tribunal had to determine the available surplus. In order to do that, it had to grant certain deductions from the gross profits. The appellants claimed deductions under a number of heads, but we are concerned only with two out of them, namely, (1) whether the appellants' claim for deduction of 51 per cent. out of the gross profits on account of income-tax was justified, and (2) what should be the amount of remuneration for the six partners, in respect of which also deduction may be granted. The Tribunal decided, that the amount of tax payable by the firm, as such, should be deducted and not as claimed by the appellant. On that basis, the Tribunal found that the amount deductible on account of income-tax would come to a little over 5 per cent. of the total amount of the gross profits. As regards the remunerations of the partners, the Tribunal fixed a lump sum of twenty thousand rupees, on a basis which is not easily discernible from the award, and may be said to be more or less conjectural. After making provision for the prior charges on the amount of the residuary surplus, the Tribunal came to the conclusion that a bonus equivalent to 1/4th of the total basic wages earned by the workmen during the year under reference, i.e., the year ended 31st October, 1958, would be justified. It then turned to the question of the alternative claim of the workmen to three months' basic wages, plus one month's dearness allowance, either as an implied term of conditions of service or as customary or traditional bonus. On a consideration of the decisions of this Court, and other decisions of High Courts and Tribunals, it came to the conclusion that though the respondents may not have succeeded in establishing their claim on the basis of implied terms of contract, they had succeeded in proving their claim for traditional or customary bonus at a uniform rate of one month's basic wages plus dearness allowance. In the result, the Tribunal awarded to the workmen bonus equivalent to the 1/4th of the total basic wages, less the amount of bonus equivalent to one month's wages already paid for the year under reference on the same terms and conditions as had been prescribed in the award in respect of the previous year ended 31st October, 1957.

Against this award, the firm has come up in appeal. There is no cross-appeal by the workmen, even though, on the findings recorded by the Tribunal, they

were found entitled to three months' wages by way of profit-sharing bonus and one month's wages plus dearness allowance by way of traditional or customary bonus on the occasion of *Dewali*.

Substantially, three questions were raised before us on behalf of the appellants, namely, (1) that deduction for income-tax, in order to arrive at the actual figure of available surplus, should have been not on the basis of what income-tax is actually payable or has been paid in respect of the registered firm, but on a notional basis, which may be analogous to the case of a registered company, or on the basis of tax payable on the lump sum income of 1.95 lakhs by an unregistered firm, or on some other basis which may have some resemblance to what each one of the partners has to pay in respect of his income; (2) that the partners' remuneration should not have been fixed by the Tribunal at Rs. 20,000, by a rule of thumb, but should have been fixed on the basis of reasonable remuneration which the firm should pay to the partners of running its business in the four departments, aforesaid. In this connection, it was said that if Rs. 96,000, as claimed by the appellants, was thought to be too high, a figure of 48,000 which is half the amount claimed, would be highly reasonable in the facts and circumstances of the business of the firm; and (3) that the Tribunal had misdirected itself in arriving at a finding that the workmen had succeeded in establishing their claim to traditional or customary bonus at a uniform rate of one month's basic wages plus dearness allowance.

We shall take up the points in the order indicated above. It is not contested on behalf of the respondents that some deduction has to be made on account of income-tax, but their learned counsel has contended that the tax should be what the firm *as such* has to pay by way of income-tax. It was said in this connection that a registered firm is a legal entity for the purposes of income-tax, and that the Tribunal was perfectly justified in giving credit only for the sum of about Rs. 10,000, worked out on that basis. On the other hand, it was contended on behalf of the appellants that 51.5 per cent. or whatever may be the actual rate of income-tax payable by a company should have been deducted. Alternatively, it was argued that 7 annas in a rupee would be a fair basis. In our opinion, it would not be right to equate a registered firm to a company for the purpose of deduction of income-tax. It is true that the income-tax deduction has to be made on a notional basis, as laid down by a Bench of five Judges in this Court, in *The Associated Cements Companies Ltd. Dwarka Cement Works, Dwarka v. Its Workmen*¹. But even so, the notional basis must have relevance to the law of income-tax in respect of firms. In this connection, the following alternatives were suggested on behalf of the appellants, namely, (1) income-tax at 7 annas in a rupee, which will wipe off about rupees 85 thousand or about 45 per cent. of the profits; (2) a sum of about Rs. 53,000 odd on the basis of income-tax payable on an income of 1.95 lakhs of the firm on the footing of the partners paying the tax at the appropriate rate on their shares of the income. This would account for about 27 per cent. of the profits, after adding the ten thousand rupees, which is a registered firm tax, as already indicated; (3) tax of one lakh forty thousand odd on the basis of the firm being unregistered, which the income-tax authorities are entitled to do in certain circumstances—this would account for about 70 per cent. of the profits; (4) income-tax amounting to roughly 68 thousand rupees, plus ten thousand rupees in respect of registered-firm tax on the basis of the tax payable by the partners on the income of the registered firm at the rate applicable to their world income, on their shares in the firm. We have no hesitation in rejecting the first suggestion of deducting about 7 annas in the rupee because that will be on the basis of a tax on a corporation, the basis which we have already rejected as unfair. Even more unacceptable is the suggestion of knocking off a lakh and 40 thousand rupees, which has the effect of setting apart the major share of the profits for income-tax on a highly notional basis. The 4th alternative of taking into account the world income of the partners of the firm would be equally unjust and unfair to the workmen in the case of the members of the firm being very rich

1. (1961) 2 S.C.J. 490 : (1959) S.C.R. 925.

persons. This course would be highly objectionable from another point of view, which is a very important consideration, namely, that in order to determine the bonus payable for a particular year of working of the firm, the world income of the partners of the firm may have to be determined in the first instance, which process may take years. As the appellants themselves have rightly stated that the deduction on account of income-tax has to be on a notional basis, the basis has got to be such as to be readily ascertainable, and that can only be done by making calculations on the profits of the firm itself, for the particular year. The last alternative of allowing deduction under this head of calculating income-tax on the actual figures of the profits of each of the partners separately appears to be reasonable, because the figures are known and the tax of each constituent member of the firm can be easily calculated on the basis of his share. But it has been argued on behalf of the respondents that the amount of income-tax payable by the firm as such, *viz.*, about Rs. 10,000 should be permissible deduction and not what each partner had to pay on his share of the profits, because it is the firm which is the employer and which can claim deduction under this head. But this contention cannot be pushed to its logical conclusion because a firm is not a legal person within the meaning of the Industrial Disputes Act. It is the partners of the firm who are the employers. It is that fact that has to be taken into account in considering the question of income-tax even as in other matters like remuneration etc., ; *i.e.*, the amount of tax payable by each partner *qua* the business of the firm, irrespective of their other sources of income or loss, because, notional is quite different from the actual, though not wholly dissociated from it. But the question still arises whether the registered-firm tax can also be added to the figure of income-tax arrived at by the process just indicated. In our opinion it would not be right to give the employers the double benefit of granting deduction on the basis of income-tax payable by each partner in respect of his share in the profits of the firm, and at the same time adding the registered-firm tax, which is paid by the firm in order to obtain certain reliefs under the Income-tax Act, which they would not otherwise have obtained. Hence, as a result of the foregoing considerations, the sum of Rs. 53,000, in round figures, should be allowable under this head of income-tax. Even that figure, it was admitted, would represent about one quarter of the profits.

The next question that falls to be determined is what amount should be allowed under the head "Remuneration to the partners of the firm". In this connection, it has been found by the Tribunal that the claim of the partners that they devoted their whole time to the business of this firm only, is not correct, and that the individual partners, on their own account, and certainly as partners of another firm have been carrying on their other business activities. It has also to be borne in mind that the partners have not been able to adduce any reliable data to determine the amount of time and energy which they devote to the business of the firm in question. It is equally true that the sum of Rs. 20,000 fixed by the Tribunal, under this head, amounting roughly to 10 per cent. of the gross profits is more or less conjectural. We know that the sum of Rs. 4,60,000 represents roughly the wage bill for the year in question. Comparing the sum allowed by way of remuneration to the partners to this figure, it appears to us that the amount fixed by the Tribunal errs on the side of inadequacy. But this Court is not in a position to come to any definite conclusion of its own on the record as it stands, assuming that it is open to this Court to record a finding, which is more or less one of fact, in disagreement with the finding of the Tribunal. It must be added that this Court does not function as a regular Court of Appeal from the Tribunal. Its function is merely to see that the law is being properly administered, in accordance with well settled rules of natural justice. Hence, we would not embark upon a fruitless task of determining a figure which will not have any substratum of solid facts and figures to support our conclusion.

The remaining question of traditional or customary bonus has been pressed upon us on behalf of the appellants. It has been argued that the Tribunal has not followed the rulings of this Court on the question of a bonus of the kind we are now dealing with. The Tribunal has come to the conclusion that the workmen

have proved that bonus at a uniform rate of one month's basic wages plus dearness allowance, on the occasion of *Dewdli*, has been paid throughout the period of more than 15 years, between 1940-41 and 1956-57. That is a finding of fact. But it has been contended that according to the judgments of this Court, in order to establish the claim for a bonus of this kind, four conditions must be fulfilled, namely, (1) that the payment has been made over an unbroken series of years; (2) that it has been so made for a sufficiently long period; (3) that the payment has been made at a uniform rate throughout, and (4) lastly, that it has been paid even in years of loss, and did not depend upon the earning of profits. It has been found by the Tribunal that the first three conditions, if they can be so called, have been fulfilled, but that the last one has not been established and could not be established because the firm was singularly fortunate in having an unbroken record of profits, year after year. It was vehemently argued on behalf of the appellants that as this last condition has not been fulfilled, the Tribunal was not justified in law in coming to the conclusion that the claim of traditional or customary bonus at the rate indicated above had been established. In our opinion, this contention is not acceptable for several reasons. Firstly, the four so-called conditions are not really in the nature of conditions precedent but are circumstances which have been taken into account by this Court in *The Graham Trading Co. (India) Ltd. v. Its Workmen*,¹ for coming to a conclusion as to whether or not a claim to customary or traditional bonus had been made out. In the case just referred to, this Court pointed out that the Tribunal has to consider those four circumstances. That those are circumstances, and not conditions precedent, is shown by the fact that this Court has pointed out that the length of the period will depend upon the circumstances of each case. A condition precedent, as such, has to be more definite than one which depends upon the circumstances of each case. Secondly, there is no rational ground for holding that payment even when there were losses is a condition precedent because, as has happened in this case a company or a firm may have an unbroken record of profits ever since it started working. Hence, if it were to be held as a condition precedent, payment of bonus satisfying the three conditions aforesaid but not this one, for however long a period, would have to be held as insufficient to establish the claim for this kind of bonus. Between profits and loss in a particular year, there may be a very small gap. The loss may be of one rupee; and similarly profits may be equally nominal. The third alternative, which may be supposed, is neither loss nor profit. According to the appellants' contention, the case for such a bonus is made out in the first supposition of a nominal loss, but not of the second or the third alternatives. The law cannot be founded on such unsubstantial considerations. The question in such cases is always one of substance, and not of form. We cannot, therefore, accept the submission that loss substantial or otherwise is a *sine qua non*. The observations of this Court in the decisions referred to above must be understood as based on considerations of substance and not of form. Such a bonus has reference to a special occasion like a festival, for example, the *Pujas* in Bengal and the *Dewali* in Western India—occasions which are generally utilised by employers to reward the services of their employees. Hence, in our opinion, what is more important to negative a plea for customary bonus would be proof that it was made *ex gratia*, and accepted as such, or that it was unconnected with any such occasion like a festival, as laid down by this Court in the case of *B. N. Elias & Co. Ltd. Employees' Union v. B. N. Elias & Co. Ltd.*² In our opinion, therefore, the Tribunal was fully justified in finding that the traditional or customary bonus had been established in this case, notwithstanding that it had not been shown, as it could not have been shown, that it was paid in a year of loss. On behalf of the respondents an attempt was made to show that such a bonus could be granted as an implied term of contract of service. But as such a case has not been made in the statement of the case in this Court, we did not allow that case to be made out at the time of the arguments. We must make it clear that this Court has to be very strict in enforcing the rules of pleading, as laid down in the rules of this Court bearing on the question of statement of case of the parties. These rules have been

1. (1960) 1 S.C.R. 107 : (1961) 1 S.C.J. 246. 2. (1960) S.C.J. 1233 : (1960) 3 S.C.R. 382.

laid down with a view to help the Court in narrowing down the controversies between the parties and also for the purpose of giving notice to the other side that a particular question will be raised, and that that party should be ready to meet that particular point. This Court would not ordinarily permit any laxity in the matter of pleadings in this Court, and litigants and their legal advisers must take note of what we have said so often in the course of arguments in a number of cases coming before us recently.

It remains to consider what is the effect of our finding on the first question relating to deduction on account of income-tax on the award made by the Tribunal. At page 129 of volume I of the paper book, there is a statement of the profits of the firm between the years 1943-44 and 1957-58, and at page 157 of the reasons of the Tribunal in volume II appears a tabular statement of the bonus paid for the corresponding period of years, which has consistently been equivalent to three months' basic wages, which is the bonus allowed in respect of the year in question also. This was so in spite of the fact that the profits have fluctuated considerably from year to year. Even after payment of the bonus as directed by the Tribunal, and making allowance for the higher amount of income-tax as determined by us, the appellants are left with a substantial amount by way of their share of the profits. It would thus appear that the Tribunal has not been too generous to the workmen when it allowed a consolidated bonus of three months' basic wages minus the amount already paid to them.

In the result, the appeal fails and is dismissed with costs.

Rajagopala Ayyangar, J.—I regret my inability to agree in the order proposed by my Lord the Chief Justice. The facts of the case and the points in dispute arising for decision have been exhaustively set out in that judgment and I consider it unnecessary to repeat them. It will be seen that the controversy is confined to two matters: (1) the quantum of the profit-bonus, if any to which the respondents would be entitled, for Samvat year 2013 (1956-57) and (2) the correctness of the declaration by the Tribunal in its award now under appeal that the respondents are entitled to customary or festival bonus on the occasion of *Diwali* and these I shall deal in that order.

Taking up first the question of profit-bonus, its quantum admittedly depends upon the surplus available for distribution. The Tribunal has awarded a bonus equivalent to three months' basic wages, this including the bonus equivalent to one month's basic wage already paid by the appellant-firm. The figure of 3 months' basic wages has been derived by following the formula enunciated by the Full Bench of the Labour Appellate Tribunal in *Mill Owners' Association, Bombay v. Rashtriya Mill Mazdoor Sangh*¹, which has received the approval of this Court in several decisions of which it is sufficient to refer to the *Associated Cement Companies Ltd. v. Its Workmen*². The gross profit, i.e., the net profit earned by the firm during the relevant year after adding back items which are inadmissible for the purpose of calculating bonus for workmen for that year was Rs. 1,95,060. Both the parties before us accepted this figure as correct and the only dispute related to the items to be deducted from it for the purpose of ascertaining the residuary surplus available for distribution among the parties entitled to a share in it. Out of this sum of Rs. 1,95,060 the Tribunal deducted the following:

1. For income-tax	..	10,305/-
2. For return on partners' capital	..	9,810/-
3. For return on working capital	..	5,595/-
4. Remuneration for the six partners	..	20,000/-
		<hr/> 45,710/- <hr/>

which left a residuary surplus of Rs. 1,49,350 out of which bonus equivalent to three months' basic wages absorbing Rs. 62,340 was awarded to the workmen leaving

1. (1950) Lab. L. J. 1247.

2. (1959) S.C.R. 925 : (1961) 2 S.C.J. 490.

Rs. 87,010 as the share of the employer and the Tribunal added that the latter "would be adequate share for the Company providing Rs. 4,250 for gratuity and taking into consideration the income-tax rebate on the amount of bonus awarded".

Out of the four items of deductions those in controversy before us are two (1) the quantum of the income-tax deductible, and (2) the remuneration allowable to the partners. As regards the first item *viz.*, income-tax payable, I am in respectful agreement with the reasoning and conclusion of my Lord the Chief Justice that where the employer is a firm that is registered under section 26-A of the Indian Income-tax Act the income-tax that the employer is entitled to deduct, is not the "registered firm tax" on the gross profits of the firm but the tax that would be payable on the share income of each partner. Both the learned Attorney-General for the appellants and Mr. Aggarwala for the workmen laid stress on the fact that the deduction from gross profits of income-tax for computing the available surplus has been referred to by this Court as a "notional" item (*vide e.g.* *B. N. Elias & Co. Ltd. Employees' Union v. B. N. Elias & Co. Ltd.*¹ and each of them developed an argument founded on this description. Relying on the "notional" character of the tax deduction, the learned Attorney-General contended that the figure deducted ought to be the same whether the employer was a company, firm or any other unit of assessment, *viz.*, 7 annas in the Rupee at one stage and 51 per cent. when the income-tax payable by a company was raised to that figure. Mr. Aggarwala on the other hand submitted that in the case of a registered firm one should ignore the tax the individuals composing the firm were under an obligation to pay on the profits derived but that the Tribunal had to take into account only "the registered firm tax" which had been imposed on registered firms ever since the Finance Act of 1956. I consider that both these arguments proceed on a mis-apprehension or a misunderstanding of the real import of the expression "Notional" in the context in which the term has been used by this Court. The expression "notional" has been used to distinguish it from the actual tax payable by the employer for the year for which profit-bonus is being calculated and the reason why the actual tax paid was discarded as a proper deduction was thus explained by this Court in the *Associated Cement Coy.'s case*²:

"The formula for awarding bonus to workmen is based on two considerations; first that labour is entitled to claim a share in the trading profits of the industry because it has partially contributed to the same,.....In consequence in working out the formula it should not be ignored that the formula proceeds to deal with the labour's claim for bonus on the basis that the relevant year for which bonus is claimed is a self-sufficient unit and the appropriate accounts have to be made on the notional basis in respect of the said year. It is because the bonus year is taken as a unit self-sufficient by itself that the refund amount received by the employer being the refund paid by him in previous years is not included on the credit side.....Similarly, the same principle governs losses incurred in previous years which the employer is entitled to have claimed under section 24 (2) during the bonus year..... Similarly, that the employer was not required to pay tax during the bonus year as a result of the adjustment of previous year's unabsorbed depreciation has no relevance in determining the available surplus from the trading profits of the bonus year. It is on the same ground, *viz.*, that the unit is the bonus year and the trading profits of that year determining the quantum of bonus available that the initial and additional depreciations besides a statutory depreciation are held not allowable."

But after these factors which are either exceptional being either special reliefs for the purpose of aiding an industry or reflecting the credits or debits attributable to different years are eliminated, one has to work out the actual tax payable on the income under the relevant provisions of the Income-tax Act before the figure of available surplus which could be distributed between the employer and the workmen could be ascertained. The rate of 7 annas in the Rupee was applied by this Court to cases where the employer was company to whom that rate applied under the then Income-tax Act, and not as any "notional" figure to be deducted. It has to be borne in mind that the calculations are for the purpose of ascertaining the available surplus and so have to be related to the amount available after payment of the tax. The fact that certain items such as, for instance, the penalty payable for defaults under the Income-tax Act or credits received thereunder which

1. (1960) S.C.J. 1233; (1960) 3 S.C.R. 378, 381. 2. (1959) S.C.R. 925; (1961) 2 S.C.J. 450.

are unrelated to the normal tax payable on the income derived by the employer are ignored, does not imply that the amount deductible under this head is wholly unrelated to the provisions of the Income-tax Act or to the amount that would be available as surplus in an idealised condition, *i.e.*, after elimination of the inadmissible factors. It is only in that sense that the figure is notional *i.e.*, in the sense that it does not take into account the actual tax payable. But it is real and otherwise than notional if the irrelevant factors are excluded. It is for this reason that I find no basis for the argument that in the case of an employer such as the one we are concerned with, the rate of tax applicable to companies for the year in question is relevant as affording any basis for computing the amount deductible under the head "income-tax". I therefore reject without hesitation the main submission of the learned Attorney-General.

For the same reason I consider that the contention urged by Mr. Aggarwala should also be rejected. If the income-tax payable has to be related to the actual available surplus, taking the business as a unit and after eliminating the factors that are not relevant for determining the tax payable for the bonus year in question and in respect of that business income, we must necessarily reach the conclusion that it is the tax payable by the several partners who constitute the firm on their share income from the business that affords a real basis for computing the deduction under this head. In saying this I have not overlooked the fact that for the purpose of the Indian Income-tax Act a firm is a unit of assessment and that in the case of a registered firm there is a special "registered firm tax" payable by that unit since 1956. Though a firm is regarded as an entity for the purpose of Income-tax Act, it is undeniable that a partnership is not an entity at law and it is the partners who constitute the employers for all purposes other than for income-tax. It is in this view that I concur in the opinion expressed by my Lord the Chief Justice that it is the tax payable by the individual partners on their share income from the firm without taking into account any income, derived by them otherwise, *i.e.*, their world income, and without allowing for any losses suffered by them in their other ventures, that would constitute the item of income-tax payable by the employer which would be the deductible head for the purpose of computing the available surplus.

I, however, do not agree with my Lord that the registered firm tax paid by the appellant-firm is not to be added to the tax payable by the individual partners on their share of the profits in arriving at the total of the income-tax payable by the business.

As regards firms registered under section 26-A of the Income-tax Act the position since 1956 is briefly this. Income-tax at specially low rates is assessable on the profits of a registered firm, but not super tax. The partners of the registered firm are liable to be charged in their individual assessments to both income-tax and super tax in respect of their share of profits derived from the firm. There is thus an element of double taxation in the case of registered firms, in respect of income-tax but not for super tax and only a partial relief against the double taxation is afforded by section 14 (2) (aa) of the Income-tax Act. What I desire to point out is that the "registered firm tax" is as much a tax paid by the partners together and is as much a deduction out of the surplus profits available for distribution as the income-tax paid by the partners individually. I do not therefore see any basis for the distinction between the "registered firm tax" paid by the partners together and the individual income-tax payable on their share income by each of the partners. In my opinion, subject to the rebate allowed under section 14 (2) (aa) the amount of "registered firm tax" payable by the firm should be added to the Rs. 53,000 and odd payable by the partners individually in respect of their share of profits. Making allowance for the rebate I would, therefore, compute the sum deductible under the head "income-tax payable" at Rs. 60,000.

The next item in dispute is as regards the sum allowed as the remuneration for the six partners for carrying on the work of his firm. I respectfully agree with the conclusion of my Lord that the figure of Rs. 20,000 allowed by the Tribunal is not

based on any relevant evidence but is merely a conjectural figure and cannot, therefore, be accepted. The proper way to have approached the question would have been for the parties to have led evidence as to what would have been the reasonable remuneration payable to strangers if the work had been entrusted to and performed by such persons. It is common ground that neither of the parties nor the Tribunal approached the problem from this point of view. In this state of circumstances two courses would be open to this Court (1) that the matter be remitted to the Tribunal, so that parties might adduce necessary evidence on these lines for a satisfactory finding to be recorded, or (2) determine the figure ourselves. Mr. Aggarwala, learned counsel for the workmen, suggested that if we did not agree with the finding of the Tribunal that Rs. 20,000 was reasonable remuneration for the six partners to have attended to the work of the firm, we might remand the case to the Tribunal for evidence being led and fresh findings reached and an award passed on the basis of such findings. The learned Attorney-General on the other hand, suggested that as the appeal was concerned with the bonus only for one year and that as evidence on these lines would be led if any question arose in regard to the later years, it was not necessary that the parties should be driven to incur more expenses in further proceedings before the Tribunal and that in the interests of both the parties we might ourselves record a finding as regards the figure which we considered reasonable taking into account the materials already on the record. He further pointed out that though before the Tribunal the appellants had claimed Rs. 96,000 as the reasonable remuneration allowable to these partners he was prepared to step down the claim to Rs. 48,000 if that would be accepted by the respondents. Though Mr. Aggarwala first appeared to consider that Rs. 48,000 was reasonable, he however, later stuck to the position that if we did not accept the finding of the Tribunal that Rs. 20,000 was reasonable remuneration the case should be sent back for a computation on the basis of further evidence which the parties might adduce.

Bearing in mind that the dispute before us relates only to one year and that parties might adduce more satisfactory evidence in regard to later years if there should be a dispute, I consider that it would not be worth while as it would impose an unnecessary strain on the parties, to have the matter remitted to the Tribunal for a fresh finding on the issue. In the circumstances, I consider that the best course would be for this Court to determine the reasonable remuneration on the basis of the materials already on record.

It is in evidence that the managerial staff, who are undoubtedly working under the partners, were paid a remuneration of Rs. 750 p.m. That, in my opinion would afford some indication of the scale of wages in this concern payable to the superior staff. If a paid manager instead of a partner were employed, his remuneration could reasonably be taken as Rs. 1,000 p.m. Now there were four separate departments in this concern carrying on four different types of business, *viz.*, Clearing and Forwarding Agents, Godown-keepers, Insurance Agents and Cotton Supervisors and Controllers. If four persons had been employed in each of these departments as superior supervisory staff the remuneration payable to them would be Rs. 4,000 a month or Rs. 48,000 for a year. Having regard to this mode of approach I consider that the figure suggested by the learned Attorney-General was reasonable and I was therefore not surprised that Mr. Aggarwala at first seemed to agree that this would be a reasonable figure. I would only add that even if each of the heads of the four departments were paid only Rs. 750 p.m., the total remuneration would come up to Rs. 36,000. I, therefore, consider that the amount reasonably allowable under this head cannot in any event be less than Rs. 40,000. I would therefore increase the item "Remuneration of partners" in the award now under appeal from Rs. 20,000 to Rs. 40,000.

I shall now proceed to consider the effect of these revisions on (a) the surplus available for distribution; and (b) the fair share which could be allowed to labour for being distributed as bonus. On the basis of the revised figures the fresh computation would be :

Gross profit	1,95,060/-
Less 1. Income-tax	60,000/-
2. Return on partners' capital	9,810/-
3. Return on working capital	5,595/-
4. Remuneration for the partners	40,000/-
	<hr/> 1,15,405

Net available surplus 79,655 or roughly 80,000. Even if this is divided equally between the employer and labour, making no provision for reserves *etc.*, it would yield only Rs. 40,000 as the share of labour available for distribution as bonus. The total amount which would be payable if a bonus of a month's basic wages were awarded would be Rs. 20,780. The utmost that could be allowed to labour would be a bonus equivalent to two months' basic wages and even taking into account the concession that the learned Attorney-General made that the return on partners' working capital be computed not at 9 per cent. as the Tribunal has done, but at 6 per cent. the result would not be very different, for that would add only Rs. 3,000 and odd to the surplus pool. In my opinion, therefore, the bonus that should be awarded to the respondents should be reduced from three months' basic wages to basic wages for a period of 2 months which would absorb Rs. 41,560 and leave something less than Rs. 40,000 to the employer instead of the Rs. 87,000 which the Tribunal considered as a reasonable apportionment for the employer.

The next matter in controversy is whether the Tribunal was right in declaring that the workmen were entitled to customary festival bonus of one month's basic wage on the occasion of *Diwali*. The question of customary bonus has been the subject of consideration by this Court on more than three occasions. Before referring to these decisions it is necessary to restate some facts which are not in controversy : (1) It is an admitted fact that a bonus has been paid of one month's basic wage from Samvat year 1997 (1940-41) to Samvat year 2013 (1956-57) *i.e.*, continuously and without any break until disputes arose in respect of the year now in controversy—1957-58. (2) Though there is some little controversy as to the precise day when it was paid in relation to the *Diwali* festival—whether it was on that day or the day succeeding *etc.*, it is common ground that it was paid at or about the time of *Diwali* and obviously to enable the workmen to meet the extra expenses which the festival involved. This has to be taken along with the fact that *Diwali* is one of the most or the most important Hindu festival in the Bombay area. (3) That during the several years for which we have evidence, *i.e.*, from 1940 onwards the firm has been making more than adequate profits to enable it to pay this amount as bonus. In other words, during all these long years there has not been any year when the firm has either sustained a loss or has been in receipt of less than adequate profits to justify this payment of bonus of one month's basic wage.

In the light of these admitted facts the very narrow point of controversy before us turns on whether it is or it is not a necessary essential pre-requisite for the establishment of a claim to customary festival bonus that it should have been paid in a year of loss or at least in a year when there was no adequate profit to justify the payment.

The requisite conditions for the workers to establish a claim to customary bonus have been laid down in at least three decisions of this Court to be immediately referred to. It was, however, not the contention of any of the parties that these rulings were erroneous or required reconsideration. The only point urged before us by either side was as to the proper construction of the requirements as laid down in these decisions. I am emphasizing this because in the appeal before us the Court is not called upon to decide afresh the circumstances in which customary bonus would be payable but its task is only to construe the previous decisions of this Court as to the conditions laid down in them as necessary for establishing such a custom.

The point on which the learned Attorney-General for the appellants laid stress was that each one of the decisions of this Court had laid down as one of the essential conditions for the establishment of a right to customary bonus that the said payment should have been made in a year in which there was loss and as admittedly this condition was not satisfied in the case of the appellants' business, the declaration granted by the Tribunal was unjustified.

I shall now proceed to refer to the authorities : *Messrs. Ispahani Ltd., Calcutta v. Ispahani Employees' Union*¹ and *Graham Trading Co. (India) Ltd. v. Its Workmen*² were heard by the same Bench and the judgments in both were delivered by Wanchoo, J., the earlier on 6th May, 1959, and the latter on the next day. One of the points involved in *Ispahani's case*¹ was whether the workmen were entitled to puja bonus for 1953. It was an appeal by Special Leave from a judgment of the Labour Appellate Tribunal, Calcutta. The Industrial Tribunal had held that it had not been established that puja bonus had been paid at uniform rates for a sufficiently long and unbroken period, and rejected the claim for puja bonus for 1953. There was an appeal by the workmen against this award of the Tribunal which was allowed by the Labour Appellate Tribunal which held that the claim to puja bonus had been established. This decision of the Appellate Tribunal was upheld by this Court. Wanchoo, J., summarised the facts upon which this finding was based, in these terms :

"In the circumstances, it was established in this case that (1) the payment was unbroken and (2) it was not paid out of bounty due to profits having arisen, *for it was paid in some years of loss also.*" (Italics mine.)

In the decision rendered the next day—*Graham Trading Co. v. Its Workmen*², the learned Judge made a more elaborate examination of the conditions for the establishment of a claim to festival bonus. He first drew a distinction between puja bonus as an implied term of employment on the one hand and as a customary or a traditional payment on the other. He observed :

"It is, however, clear that puja bonus which is usually paid in Bengal is of two kinds, *viz.*, (1) where it is paid as an implied term of employment.....and (2) where it is paid as a customary and traditional payment..... We have considered the tests to be applied where it is a case of payment on an implied term of employment in *Messrs. Ispahani Ltd. v. Ispahani Employees' Union*¹ and we need not repeat what we have said there. In the present case it has been pointed out by the company that payments which had been made in the past years from 1940 to 1952 could not be considered as based on an implied term of employment in the circumstances of this case..... The question, however, whether the payment in this case was customary and traditional, still remains to be considered. In dealing with puja bonus based on an implied term of employment, it was pointed out by us in *Messrs. Ispahani Ltd. v. Ispahani Employees' Union*¹ that a term may be implied, even though the payment may not have been at a uniform rate throughout and the Industrial Tribunal would be justified in deciding what should be the quantum of payment in a particular year taking into account the varying payments made in previous years. But when the question of customary and traditional bonus arises for adjudication, the considerations may be somewhat different. In such a case, the Tribunal will have to consider (i) whether the payment has been over an unbroken series of years; (ii) whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case ; even so the period may normally have to be longer to justify an inference of traditional and customary puja bonus than may be the case with puja bonus based on an implied term of employment ; (iii) *the circumstance that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss.*..... (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern. It will be seen that these tests are in substance more stringent than the tests applied for proof of puja bonus as an implied term of employment." (Italics mine.)

Later, dealing with the facts from which the Court drew an inference that the workmen had established the right to customary bonus and particularly condition (iii) italicised earlier, the learned Judge added :

"The condition that the payment should have been made in years of loss also to exclude the hypothesis that it was paid only because profits had been made, has also been satisfied, for the evidence is that payments were made in at least two years of loss."

The third case of this Court in which the point arose was *Elias & Co. Employees' Union v. Elias & Co.*³, in which also the judgment of the Court was delivered by Wanchoo, J. The appeal before this Court was by Special Leave from an award of the Industrial Tribunal and the case of the appellants—the employees was that they were entitled to a bonus irrespective of profit on a scale which they set out. The Tribunal negatived the case of the employees to bonus on all the three grounds upon which bonus was payable, *viz.*, profit bonus, as an implied condition of service and thirdly as customary bonus. Dealing with the question of customary bonus of one month's basic wages of the subordinate staff, the learned Judge said :

1. (1960) 1 S.C.R. 24.

2. (1960) 1 S.C.R. 107; (1961) 1 S.C.J. 246.

3. (1960) S.C.J. 1233 : (1960) 3 S.C.R. 378.

"This payment of one month's basic wage as bonus at puja appears to have continued uninterrupted from the time it started in 1942 or thereabout up to the time the dispute arose in 1954. The payment was invariably of one month's basic wage and it appears that it was paid even in a year of loss."

On this ground the appeal was allowed in regard to this item. Lastly, *In the Management of Tocklai Experimental Station v. Workmen*¹, the judgment was pronounced by Gajendragadkar, J. (who incidentally was a member of the Bench which decided each of the three earlier cases). Dealing with Puja bonus the learned Judge observed :

"Customary puja bonus undoubtedly prevails in many industries in Bengal but there are certain tests which have to be applied in determining the validity of the claim. The amount by way of puja bonus, it must be shown, has been consistently paid by the employer to his employees from year to year at the same rate, that it has been paid even in years of loss and that it has no relation to the profit made by the employer during the relevant year. The course of conduct spreading over a reasonably long period between the employer and the employees in the matter of payment of puja bonus is of considerable importance in dealing with the claim of customary puja bonus (vide *The Graham Trading Co. (India) Ltd. v. Its Workmen*).²"

The question now for consideration is whether on those authorities, reasonably construed it is or it is not a necessary condition for the establishment of a claim to customary bonus that it has been paid in a year of loss. The extracts that I have made from the judgment of this Court in the *Graham Trading Co.'s case*² where it is referred to as the third condition and the specific reference to loss in the three other decisions, particularly bearing in mind the fact that the same members of the Court had taken part in these several decisions, and Gajendragadkar, J., took part in all the four, I feel unable to hold that the learned Judges did not intend this to be an essential condition. In the *Graham case*² the reason for the insistence of this condition is stated, viz., that it is only a payment during a year when there is loss that would negative the payment being a bounty. In these circumstances I do not consider it possible to construe these judgments as laying down that payment during a year of loss was merely a relevant circumstance and not a necessary condition. If, as I have pointed out earlier, what the Court is now called on to do is only to construe these decisions, and not consider the question afresh, I feel compelled to hold that in these several decisions this Court did lay down that this was a *sine qua non* for making good the claim.

It was suggested during the course of the argument that there was no difference between a loss of one rupee for the year and a profit of a similar sum and that if the decisions were literally understood it would lead to an unreasonable result, for whereas the claim would be excluded in the event of a loss—even though the same be nominal, even the existence of a nominal profit would enable the claim to be established. I agree that we are not construing a statute and that in the context in which the condition has been laid down, viz., that it should negative the payment being by way of bounty, the expression "loss" should be understood in the sense of an inadequacy of profit which would not justify the payment of that bonus. But where the profits are adequate to enable the payment of the bonus, it appears to me that these decisions clearly lay down that the right to customary bonus is not established; for as explained in the *Graham Trading Coy's case*,² the payment being by way of bounty would not then be excluded. In this connection it has to be borne in mind that when the right to customary bonus is held to be established, the workmen are entitled to it in future years even in a year of loss and *a fortiori* so in a year when the profits are inadequate to justify that payment. In these circumstances it stands to reason that there must be an earlier year in which payment has been made in such circumstances as to serve as a precedent for the future, i.e., to establish the custom for payment in later years. As in the present case it is admitted that there has been an adequacy of profits to justify the payment of one month's bonus during *Diwali* during all the earlier years the declaration granted by the Tribunal is without justification and the finding in that regard has to be set aside.

The result therefore is that I would allow the appeal in part, reduce the profit bonus to basic wages for two months including the one month's basic wage as bonus already paid, and delete the declaration as to customary bonus.

1. A.I.R. 1962 S.C. 1340.

2. (1960) 1 S.C.R. 107 : (1961) 1 S.C.J. 246.

ORDER OF THE COURT.

Sinha, C.J.—In view of the judgment of the majority, the appeal stands dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

Dr. C. A. Cherman and another

.. Appellants*

v.

A. Menon and others

.. Respondents.

Malabar Law—Tarwad—Karnavan giving power of attorney to Anandran during his absence—Anandran and other members executing sale deed—Validity where consent of Karnavan has not been given.

By a family *karar* a *karnavan's* power of management can be restricted and also a *Karnavan's* power of management can be delegated, so long as what is delegated is not the totality of the powers enjoyed by a *Karnavan* by virtue of his status. The concept of Malabar Law is that the properties belong to all the members of the *Tarwad* and apart from the right of management the *Karnavan* has no larger right or interest than the other members. The *Karnavan* owes among other duties a duty to the members of the *Tarwad* to manage the properties in the best interest of the members. Those to whom the duties are owed may find that in their own interest the duties can be best performed by an *Anandran* in particular circumstances. These would be good reasons to justify the delegation of a *Karnavan's* power of management to an *Anandran* by a family *karar* and to uphold such *karar*. The delegation by a power of attorney by the *Karnavan* to an *Anandran* merely of a power of management which is revocable cannot be regarded as a delegation of the office of the *Karnavan*. There is thus no question of its operating as renunciation.

A sale executed in pursuance of the power of attorney by the *Mukthiar* and other members of the *Tarwad* cannot be challenged on the ground of the non-inclusion of the *Karnavan* in the sale deed. Where the power of attorney is supported by the parties it is legitimate to assume that the power of attorney empowered the *Mukthiar* to sell family property with the consent of the other adult members of the family for family necessity if he formed the opinion that it was necessary to do so and also that the power itself was executed in pursuance of a family *karar*. The execution of a power of attorney like this would in effect, be a restriction placed by a family *karar* on the power of the *Karnavan* by the consent of all the members which of course includes the consent of the *Karnavan* himself.

Appeal from the Judgment and Decree dated the 14th October, 1958, of the Kerala High Court, Ernakulam in A.S. No. 297 of 1955-E.

M. K. Nambyar, Senior Advocate (*S.N. Andley, Rameshwar Nath* and *P. L. Vohra*, Advocates, of *M/s. Rajinder Narain & Co.*, with him), for Appellants.

A. V. Viswanatha Sastri (*Sardar Bahadur*, Advocate, with him), for Respondents 1-3.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal from a decree of the High Court of Kerala by a certificate granted by it under Article 133 (1) of the Constitution.

The appeal arises out of a suit instituted by a *Karnavan* of a *Tarwad* along with two minor members of the *Tarwad* for setting aside a registered assignment deed (hereafter referred to as sale deed) executed by his *Mukthiar* *Karunakara Menon*, who is a junior member of the *Tarwad* and by all the other adult members of the *Tarwad* on 17-6-1117 (M.E.). We have not been able to ascertain the correct date according to the Gregorian calendar; but it has been accepted before us that the document was executed in the month of February, 1942. Nothing, however, turns on the precise date of the execution of the document. This document is in fact a sale deed and thereunder certain property belonging to the *Tarwad* was sold to the first defendant to the suit, who is appellant No. 1 before us, for a consideration of Rs. 8,000. Out of the amount of Rs. 8,000, a sum of Rs. 5,250 was required for discharging the debt due under a mortgage decree against the *Tarwad*.

The grounds on which the sale is challenged by the plaintiffs are briefly these :

(1) That the sale outright of the suit properties for Rs. 8,000 was not justified for satisfying the decretal debt of Rs. 5,250 because the prevailing price of immovable property would be Rs. 40,000 or so.

(2) That the sale was effected by a collusion between the first defendant and the third defendant Karunakara Menon who was the *Mukthiar* of the plaintiff No. 1.

(3) That upon a proper construction of the power of attorney the *Mukthiar* could execute a sale deed only if the Karnavan in his discretion thought it to be necessary for meeting the pressing needs or for the benefit of the Tarwad to effect it and that as the Karnavan had not consented to the execution of the sale deed it is not binding upon the Tarwad.

(4) That if the power of attorney is construed as having vested in the third defendant with the discretion and judgment of the Karnavan regarding the necessity and expediency of alienating the Tarwad property such a delegation is beyond the powers of the Karnavan and would be void and inoperative in law. An act purporting to be done under the colour of such authority is not valid and cannot bind the Tarwad.

(5) That the plaintiffs 2 and 3 were not represented by their legal guardian, that is, the Karnavan, and the purported representation by their mother the 5th defendant as their guardian is ineffective because she could not in law act as guardian in this transaction. The sale deed is, therefore, null and void.

(6) That the defendants 2, 4 and 5 who had joined in the sale deed had obviously done so on the footing that it was an intended conveyance of the rights of the Tarwad and that if the deed is not legally effective to pass the rights of the Tarwad as not being a valid act of the Karnavan, it cannot be regarded as having been intended to be executed by those three defendants. Further, that these defendants did not apply their minds to the propriety or necessity of the transaction but were merely misled by the statements and representations of the third defendant as to the necessity for executing the deed.

The transaction was challenged on three other minor grounds in the plaint but it is not necessary to refer to them because no arguments were advanced before us with regard to them.

The first defendant who is a woman doctor contended that the transaction was valid and operative and was not liable to be set aside on any of the grounds on which it was challenged by the plaintiffs. She contended that apart from the decretal debt there were other outstanding debts of the Tarwad, which had to be satisfied and that the properties in the suit were attached in execution of a decree obtained against the Tarwad in some other suit. The defendant believed, after making due enquiry and on the faith of the representations made by the assignors, that the whole of the amount of Rs. 8,000 was required for discharging debts binding on the Tarwad, entered into the transaction *bona fide*. The price paid by her for the property was the prevailing market price for similar lands in the locality. Further, according to her, she had spent Rs. 8,000 after the purchase of the property for levelling the land and for strengthening the bunds. According to her it is because the value of the land has now gone up considerably that the plaintiffs and other members of the Tarwad are attempting to defeat her just rights.

Then again, according to her, on a proper construction of the power of attorney it would appear that the third defendant was authorised by the plaintiff No. 1 as Karnavan to act on his behalf in all matters relating to the Tarwad. She also contended that it was wrong to construe the power of attorney as amounting to a delegation of the whole of the power of the Karnavan. She, however, admitted that at the time of the execution of the sale deed it was not possible to get the written consent of the Karnavan, the plaintiff No. 1. Reference was made by her to several similar transactions entered into by the defendant No. 3 in which the other adult

members of the family had joined and it was pointed out that none of them has been challenged by the plaintiffs, suggesting thereby that they accepted the validity of transactions of a similar kind.

The trial Court held that the sale in favour of the first defendant was binding on the Tarwad and dismissed the suit. It may be mentioned that in addition to the claim for possession of the property in the suit, the plaintiffs had asked for mesne profits. Naturally, that claim also was dismissed by the trial Court in view of its finding on the main issue. For the same reason it did not give any finding on the question of improvements alleged to have been made by the first defendant.

On appeal the High Court reversed the decree of the first Court. Before the High Court the validity of the alienation was challenged on three grounds :

- (1) The non-joinder of the Karnavan in the execution of the sale deed.
- (2) The inadequacy of consideration for the transaction.
- (3) Want of legal necessity for the transaction.

While it held that the sale was justified on the grounds of necessity and that the consideration was adequate, the High Court came to the conclusion that the transaction was not binding on the Tarwad because the Karnavan had not joined in it. According to the High Court the power of attorney executed by the first plaintiff on 22nd March, 1939, in favour of the third defendant cannot be effective as delegation to the third defendant of the first plaintiff's power with respect to the Tarwad property and, therefore, the transaction must fail as an act of the Tarwad. While reversing the decree of the trial Court and decreeing the suit the High Court ordered that the plaintiff would be entitled to the possession of the property on depositing Rs. 8,000 which was the amount of consideration paid by defendant No. 1 and of which the Tarwad had received benefit and, in addition, depositing Rs. 2,530 in respect of the money spent by defendant No. 1 for improving the property. The High Court, however, ordered that the plaintiffs would be entitled to mesne profits from the date of suit at 1,200 *paras* of paddy per annum till recovery of possession.

It is not contended before us on behalf of the plaintiffs-respondents that the transaction was not supported by necessity or that the consideration was inadequate and, therefore, the only question which we have to consider in relation to the validity of the transaction is whether it was competent for the defendant No. 3, acting as the *Mukthiar* of the Karnavan, to effect the sale in association with the other adult members of the Tarwad. On this part of the case the contention of Mr. M. K. Nambiar for the appellants who are defendant No. 1 and defendant No. 6, a person cultivating the lands under the defendant No. 1, are these :

(1) Where all members of the Tarwad join in the execution of a sale deed the question of delegation by the Karnavan does not arise.

(2) Where a Karnavan challenges a sale on the ground that his *Mukthiar* had not obtained his consent for effecting it that sale cannot be set aside unless the Karnavan proves the terms of the power of attorney and also proves that he did not assent to the transaction.

(3) When a Karnavan impugns a sale because it was effected by virtue of a power of attorney which according to him amounts to a delegation of his powers as Karnavan the sale cannot be set aside unless the power of attorney is itself produced.

The last two grounds are based upon the fact that the power of attorney has not been produced in this case and no explanation is given for its non-production. It would appear from the averments made by the defendant in the written statement that she had taken out summonses both against the plaintiff No. 1 and defendant No. 3 to produce the power of attorney in Court but they neither produced it nor made a statement on the point.

Relying upon certain passages in the late Mr. Justice Sundara Aiyar's "Treatise on Malabar and Aliyasanthana Law" (1922 ed.) Mr. Nambiar contended that where all the members of the Tarwad join in a transaction that transaction is binding on the Tarwad. A Karnavan is of course entitled to alienate the Tarwad property for family necessity but where a transaction is entered into by all the members of the Tarwad the existence of such necessity need not be established. This, according to Mr. Nambiar, is the common law of Malabar. The family being resident in that part of Kerala which was formerly part of the Province of Madras, is governed by the common law as modified by statute. The main statute bearing on the point is the Madras Marumakkattayam Act, 1932 (Madras Act XXII of 1933). This Act has been amended by some later Madras Acts and Central Acts but with those amendments we are not concerned in this appeal. Under the common law the Karnavan had complete power of alienating the Tarwad property for necessity and in this regard he was the sole judge of the necessity. Section 33 of the Act, however, restricts that power and provides that for certain transactions, including a sale for the Tarwad's necessity or benefit, the written consent of the majority of the major members of the Tarwad must be obtained by the Karnavan. According to Mr. Nambiar this provision does not in any way derogate from the right of all the members of the Tarwad acting together to partition the Tarwad property amongst themselves or to alienate it in any manner they choose. Thus according to him, section 33 of the Act deals only partly with the subject of alienation of Tarwad property and not the whole of it.

Under the common law, according to him, property belonging to a Tarwad is the property of all the male and female members composing it and that the Karnavan has no greater personal right in the property than the junior members thereof. In fact the family consists of individuals with equal rights. No doubt the Karnavan has the exclusive right to manage the Tarwad property but his power is no more than that of a manager of a Mitakshara family. Nor again, does the property vest in the manager alone but in all the members of the family of the Tarwad. The right of the Karnavan to manage the family property is also subject to regulation by the common consent of all the members of the family and that family *karars* restricting the rights of the Karnavan are a common feature in Malabar. Where a Karnavan's rights are so restricted by common consent—which necessarily includes his own consent—he cannot ordinarily dispute the binding effect of the *karar* upon him.

The occasion for the execution of the power of attorney by the first plaintiff was admittedly the fact that the Karnavan left his native place for Borneo where he had taken up an appointment. The senior Anandravan in the Tarwad was defendant No. 2 but he was holding a post with the Madras Government which required his being away from the family house during the whole of his service. Karunakara Menon, the third defendant was next in seniority and as he was residing in the family house the first plaintiff Achuta Menon executed the power of attorney in his favour. We may incidentally mention that Leelavathi Amma the 5th defendant in suit is the wife of one Dr. P. B. Menon of Calicut and as she lives with him there she could not have been able to look after the family property. Nor again could the fourth defendant Govinda Menon attend to the work because he was also employed elsewhere. The family was clearly in difficulties and, therefore, according to Mr. Nambiar, it was essential for Achuta Menon to delegate as much authority to the person living in the family house as was permissible under law so as to enable him to manage the property in the best interests of the Tarwad. It was for this reason that the power of attorney was executed in favour of Karunakara Menon, the third defendant. -

In its judgment the High Court has not said that there was no occasion for the execution of a power of attorney. But according to it even by executing such power of attorney in favour of the third defendant it was not legally competent for the plaintiff No. 1 to enable the third defendant to alienate family property except with his consent. The power of attorney not having been produced, the

High Court considered the matter from two angles, full delegation and partial delegation. It first considered the matter on the assumption that the power of attorney conferred full power upon the defendant No. 3 to act for the Karnavan the plaintiff No. 1, and alienate the property without reference to him. The High Court, after referring to certain decisions of the Madras High Court, came to the conclusion that such an empowerment by the Karnavan amounted to a delegation not only of his rights as a Karnavan but also of his duties to the Tarwad and was, consequently, invalid in law. The High Court pointed out that where the power of attorney confers such wide powers on the *Mukthiar*, it is nothing but a delegation of the Karnavan's power and this is not permissible under the Marumakkattayam law which is the common law of Malabar. If, on the other hand, the delegation was not so extensive and if the power of attorney provided that the *Mukthiar*, the third defendant, was empowered to execute a sale deed on behalf of the Tarwad as an agent of the Karnavan after obtaining the consent of the Karnavan—here admittedly no such consent was obtained—the transaction must be deemed to be beyond the competence of the *Mukthiar*.

It would be useful to consider the decisions in which some aspects of the question have been dealt with. In *Cherukoman v. Ismala*¹, Holloway, J., who is regarded as an authority on Marumakkattayam law expressed the opinion that Karnavanship could not be renounced. But his view has not been accepted in *Kenath Puthen Vitil Tavazhi v. Narayanan and others*². In the course of their judgment the Full Bench pointed out that there is nothing in principle in the position of the Karnavan opposed to renunciation by him of his office of Karnavan. They say that just as a trustee may renounce his trusteeship with the sanction of the Court or assent of the beneficiaries a Karnavan, who, though he holds a fiduciary position and yet is not a trustee, can also renounce. But since a Karnavan is not bound to render any account or to pay to the Tarwad any surplus in his hands the reasons which exist in the case of a trustee to obtain the concurrence of the beneficiary before renouncing a trust do not exist in the case of a Karnavan. Then they point out at page 196: "It is decidedly for the benefit of the Tarwad that such power of renunciation should be recognised. An unwilling Karnavan usually makes a bad manager." In conclusion they held that it will be open to a Karnavan of a Tarwad to renounce his Karnavanship including his right to manage Tarwad affairs. This view has not since been departed from.

Though a Karnavan can thus renounce his office he cannot delegate or transfer that office. For, if he renounces his office the senior Anandravan has a right to succeed him as Karnavan and the rights of senior Anandravan would be jeopardized if it were open to a Karnavan to transfer or delegate his office. If, therefore, a Karnavan delegates all his rights and obligations either to another member of the Tarwad or to a stranger without reserving any power of revocation the Court will not give effect to such delegation as that would amount to transfer of his office as a Karnavan. But if it is possible to say that the delegation is not absolute in its character and is subject to resumption by the Karnavan the Courts would treat it merely as a power of attorney (see *Cherukoman v. Ismala*¹).

The question then is to what extent can a Karnavan delegate his right to manage the property to another. Referring to this question Mutrusami Ayyar, J., observed in *Chapman Nayar v. Assen Kutti*³:

"There can be no doubt, and it is not denied for the respondent, that Karnavanship as recognised in Malabar is a birthright inherent in one's status as the senior male member of a tarwad. It is therefore a personal right and as such it cannot be assigned to a stranger either permanently or for a time. If it can be delegated at all, it is capable of delegation only to a member of the tarwad, the principle being that the *de facto* manager thereby assists the karnavan during his pleasure, and is entitled to do so by reason of his connection with the tarwad and his interest in its property."

Then referring to the document which fell to be construed in that case the learned Judge observed:

1. (1870-71) 6 Mad. H.C.R. 145.

2. (1905) 14 M.L.J. 415 (F.B.): I.L.R. 28

Mad. 5182.

3. (1889) I.L.R. 12 Mad. 219.

"If it is an assignment of the right of karnavanship, it is void, though for a term only, on the ground that the delegate is not a member of the tarwad ; if on the other hand, it is a power of attorney limited to management of specific property as an agent subject to the general control of the karnavan, it may be valid on the ground that the karnavanship is *not* the interest assigned or delegated."

In that case the Karnavan of a Malabar Tarwad having been sentenced to a term of imprisonment, delegated to his son all his powers as Karnavan for being exercised during the period he was serving his sentence. The High Court held that the delegation was *ultra vires* and void having been made in favour of a stranger. For, though the delegation was in favour of the sons he was in fact member of his mother's Tarwad and was, therefore, a stranger *vis-a-vis* his father's Tarwad. Referring to this decision Seshagiri Ayyar, J., observed in *Krishnan Kidavu (Mehpat Parkum Anandran) v. Raman alias Puthalathunnalshyled Kotakkat Panikkar*¹ :

"The karnavan has two capacities—a temporal and a spiritual one. In the former he is the manager of the family properties, maintains the junior members, represents the tarwad in transactions with strangers, etc. In his latter capacity he presides at the ceremonies and performs all the religious duties which are incumbent on him. A stranger cannot supplant him in this latter office, but I fail to see why his duties as manager could not be delegated to a stranger. If a receiver is appointed pending a suit for the removal of a karnavan, this officer will have all the rights of a karnavan so far as management is concerned. An agent who acts with the consent of all the members in managing the temporal affairs of a tarwad cannot be in a worse position."

For these reasons he held that a family *karar* which gave the management to a person who had ceased to be a member of the Tarwad was good and effective. This decision has been referred to by the learned Judges of the Kerala High Court in their judgment under appeal² but they have apparently regarded the observation of Seshagiri Ayyar, J., as *obiter*. On the other hand they have placed reliance on the decision in *K. Ramankutty Menon v. Beevi Umma*³. In that case the Karnavan of a Tarwad executed a document in the first part of which he renounced his powers of management of the Tarwad and in the second part delegated them to two of the junior Anandravans for a consideration of Rs. 500 and future maintenance. The document recited that the said Anandravans were to act as the representatives of himself, the Karnavan. The High Court held that the document must be held to operate as either renouncing the Karnavan's powers or as delegating them. If it was the former it was invalid because it did not amount to an out-and-out and unconditional renunciation, recognizing the senior Anandravan's rights of succession. If it was the latter it was invalid because a Karnavan has no right to delegate his powers. In support of its conclusion the High Court relied upon the decision in *Chappan Nayar v. Assen Kutty*⁴ and distinguished the decision of the Full Bench in *Kenath Puthen Vittil Thyazhi v. Narayanan*⁵. No doubt, as a deed of renunciation the document was invalid. Under the document the joint managers would not become Karnavans but only be the *Mukthiars* of the Karnavan having the right to manage the Tarwad property. That the Karnavan's power of management can be restricted by a family *karar* cannot be disputed (see *P. K. Govindan Nair v. P. Narayanan Nair*⁶.) It is, however, not clear from the report whether the delegation by the Karnavan was by virtue of a family *karar* to which all members of the Tarwad were parties. The case is, therefore, distinguishable from the one before us.

The view taken by Seshagiri Ayyar, J., in *Krishnan Kidavu's case*¹, is that the power of management could be transferred by the Karnavan with the consent of all the members of the Tarwad to another person so long of course as the transfer or delegation of power is revocable. According to the learned Judge a delegation of the power of management in favour of even a stranger would be valid. This view is not in consonance with that taken in *Chappan Nayar's case*⁴, which the learned Judge has not chosen to follow. It is also opposed to that taken in certain other cases. For the purposes of this case it is not necessary to say which of the two views is correct because here the delegation is in favour of Anandravan, though not the seniormost Anandravan.

1. (1916) I.L.R. 39 Mad. 918, 920.

2. I.L.R. (1959) Kerala 902.

3. A.I.R. 1929 Mad. 266.

4. (1889) I.L.R. 12 Mad. 219.

5. (1905) 14 M.L.J. 415 (F.B.) : I.L.R. 28 Mad. 182.

6. (1912) 23 M.L.J. 706.

The decisions referred to above thus recognise that by a family *karar* a Karnavan's power of management can be restricted and also that Karnavan's power of management can be delegated, so long as what is delegated is not the totality of the powers enjoyed by a Karnavan by virtue of his status. The question then is whether it follows from this that a Karnavan's duties arising in connection with the management of the Tarwad can be delegated. One more concept of the Malabar law has to be borne in mind. The concept is that the properties belong to all the members of the Tarwad and that apart from the right of management the Karnavan has no larger right or interest than the other members. This is clear from the decision of Seshagiri Ayyar, J., in *Krishnan Kidavu's case*¹, and the decisions referred to therein. By virtue of his status the Karnavan owes certain duties to the members of the Tarwad and one of such duties is to manage the properties in the best interest of the members. Those to whom the duties are owed may find that in their own interest the duties can be best performed by an Anandravan in particular circumstances. These would be good reasons to justify the delegation of a Karnavan's power of management to an Anandravan by a family *karar* and to uphold such *karar*. Thus where for some reason the Karnavan is not able to discharge his duties in respect of management of the Tarwad property such as in the case before us, that is, where the Karnavan has left the country for an indefinite period or taken up a job in another country which would keep him away for years from his mother country there must be some one who could look after the family property and who would have the power to manage it. If delegation of the Karnavan's power of management is regarded as incompetent the necessary result would be that the interests of the family would suffer. It is by no means a practical proposition to expect the family members to approach the Karnavan, when he is at some far off corner, for his consent in regard to each and every transaction, be it sale, mortgage or lease. Again it may be too expensive for the Karnavan to come all the way back to his native place whenever an occasion arises for alienating or encumbering the Tarwad property for family necessity. No recognised concept underlying the Marumakkatayam law will be violated by holding that an agreement or *karar* entered into by the Karnavan and the members of the family by which the power of management of the Tarwad carrying with it the duty to decide during the absence of the Karnavan whether a particular alienation should be effected for meeting a family necessity is delegated to a *Mukthiar* so that he can exercise that power with the concurrence of the adult members during the absence of the Karnavan as and when occasion arises is a perfectly valid agreement. On the other hand to hold that this is permissible would be in consonance with the concept of joint ownership by all the members of the Tarwad properties and with the settled legal position that the powers of a Karnavan could be restricted by the consent of all, which, of course, includes the consent of the Karnavan himself. The execution of a power of attorney of this kind would, in effect, be a restriction placed by a family *karar* on the power of the Karnavan. The delegation merely of power of management which is revocable cannot be regarded as a delegation of the office of the Karnavan. The Karnavan continues to be Karnavan but during his absence from the spot his managerial powers are exercisable by the *Mukthiar*. After he returns he can resume the management and carry on the affairs of the Tarwad. Or again, the delegation being through a power of attorney he can in a proper case put an end to it by revoking the power of attorney. Thus, despite the execution of such a power of attorney he does not fade out completely and, therefore, there is no question of its operating as renunciation.

The power of attorney given by the plaintiff No. 1 to defendant No. 3 has quite clearly been suppressed by them and we are, therefore, entitled to infer from this fact that, if produced, it would have gone against the interests of the plaintiffs and other members of the Tarwad. It would, therefore, be legitimate for us to assume that the power of attorney empowered the third defendant to sell family property with the consent of the other adult members of the family for family necessity

1. (1914) I.L.R. 39 Mad. 918.

if he formed the opinion that it was necessary to do so. The fact that the plaintiff No. 1 executed the power of attorney before leaving for Borneo and thereafter several properties were alienated by the *Mukthiar* in conjunction with the other Anandravans and none of the alienations except the one in suit has been challenged by the plaintiff No. 1 in all these years justifies the inference that these dispositions were in pursuance of the power of attorney and also that the power of attorney was itself executed by the plaintiff No. 1 in pursuance of a family *karar*. Upon this view, therefore, the appeal must succeed. The appellants' costs shall throughout be borne by the plaintiffs-respondents.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Kanwal Lal

.. *Appellant**

v.

The State of Punjab

.. *Respondent.*

Penal Code (XLV of 1860), section 499, Exceptions 8 and 9 and Punjab Gram Panchayat Act, 1952, section 42—Scope and effect.

In order to establish a defence under *Exception 8* to section 499 of the Penal Code (XLV of 1860), the accused must prove that the person to whom the complaint was made had lawful authority over the person complained against in respect of the subject matter of the accusation. Likewise under *Exception 9* to section 499 of the Penal Code, besides the *bona fides* of the person making the imputation, the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication. In the instant case, the communication cannot be said to satisfy the test stated above. Further under section 42 of the Punjab Gram Panchayat Act, 1952, the complaint was excluded from the jurisdiction of the Panchayat since the appellant was a public servant. Thus the appellant was properly convicted of the offence.

Appeal by Special Leave from the Judgment and order dated the 11th May, 1961 of the Punjab High Court in Cr. R. No. 580 of 1961.

Naamit Lal, Advocate, for Appellant.

Gopal Singh and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is an appeal by Special Leave against the judgment of the High Court of Punjab by which a Criminal Revision filed against an appellate order of the Additional Sessions Judge, Ludhiana, confirming the appellant's conviction and sentence was dismissed *in limine*.

The facts giving rise to the appeal lie in a very narrow compass. The appellant was prosecuted on a complaint filed by Mst. Ram Rakhi of the offence of defamation under section 500, Indian Penal Code. The appellant and Mst. Ram Rakhi were neighbours. The defamatory matter was contained in a communication addressed by the appellant who is a member of the police force to the District Panchayat Officer Ludhiana. In this "application" the appellant alleged that the complainant was a woman of loose character who was having illicit connection with goondas, her paramours coming to her frequently at nights and that her immoral activities reflected badly on the locality in which the appellant lived. There is no doubt that this was grossly defamatory of the complainant. The defence of the appellant substantially was that in substance the allegations were true and that he was entitled to make this application to the Panchayat in order to seek the assistance of that body for getting the complainant out of the locality and for this purpose he relied upon the last paragraph of the application which ran :

"Petty problems like this can be easily solved by the village Panchayat instead of referring the case to the Court. It is therefore requested that the Panchayat of village Sanghol (P.O. Sanghol) District, Ludhiana may kindly be asked to take suitable action to end this prostitution *adda*, after getting the house in which Shadi (father of the complainant) is residing at present, vacated from him."

The learned Magistrate considered a large volume of evidence that was led as regards the plea of justification as well as of the qualified privilege within *Exceptions* 8 and 9 of section 499, Indian Penal Code and rejecting the defence, convicted the appellant of the offence charged and sentenced him to undergo rigorous imprisonment for six months. The appellant filed an appeal which was dismissed by the Additional Sessions Judge and he recorded :

"I come to the conclusion that accused Kanwal Lal was rightly convicted and sentenced by the Trial Court. The offence against him is fully established. He deserves no mercy. He was employed in the office of the Inspector-General of Police, Punjab, Chandigarh and he tried to use his office which he was holding simply to over-awe the poor complainant and her parents, just to get the possession of his house from them. The quantum of sentence passed against the accused appears to be correct in view of his first offence and youthful age."

It was the revision filed against this judgment that was dismissed *in limine* by the High Court.

There being no dispute about the publication or of the published matter being defamatory being of a character falling within section 499, Indian Penal Code, the only argument that was addressed before us was based upon the case falling within *Exceptions* 8 and 9 to section 499, Indian Penal Code. *Exception* 8 runs in these terms :

"It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation."

In order to establish a defence under this exception the accused would have to prove that the person to whom the complaint was made had lawful authority over the person complained against, in respect of the subject-matter of the accusation. If the District Panchayat Officer or the Panchayat had such lawful authority, the last paragraph of the offending communication would have justified such a plea. But there is no basis at all for this argument in view of the clear provisions of the Punjab Gram Panchayat Act, 1952 under which statute alone Panchayats have jurisdiction. Chapter IV of that Act deals with the Criminal Jurisdiction of the Panchayat. Section 38 with which that Chapter opens, enacts :

"The criminal jurisdiction of a Gram Panchayat shall be confined to the trial of offences specified in Schedule 1-A."

Prostitution is not an offence under the Indian Penal Code and the keeping of a disorderly or bawdy house is not an offence within Schedule 1-A to which offences alone the criminal jurisdiction of Panchayats extends. If this were not sufficient to negative any defence based upon *Exception* 8, reference may be made to section 42 of the Gram Panchayat Act which by its first sub-section enacts :

"Subject to the provisions of sub-section (3) no panchayat shall take cognizance of any offence under the Indian Penal Code, 1860 in which either the complainant or the accused is a public servant."

So even if the complaint should be taken to be a complaint of a public nuisance it was doubly excluded from the jurisdiction of the Panchayat since the appellant was a public servant. The defence based on *Exception* 8 must therefore fail.

Nor is there more substance in the invocation of the 9th exception. That exception runs :

"It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good."

Even if good faith be taken to have been established, the imputation has to be made for the protection of the interest of the person making it. Learned counsel suggested that the terms of the provision were satisfied since the appellant made the accusation to protect his own interest. That is certainly not the meaning of the exception. It posits that the person to whom the communication is made has an interest in protecting the person making the accusation. In other words, besides the *bona fides* of the person making the imputation, the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication. This exception merely reproduces the principle laid down by Lord Campbell, C.J., in *Harrison v. Bush*¹ :

1. (1855) 5 E. & B. 344 at p. 348.

"A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable."

The point of difference between *Exceptions* 8 and 9 is that whereas in the former the person to whom the complaint is made must have lawful authority to deal with the subject-matter of the complaint and take proceedings against that person, there is no such requirement in *Exception* 9 where it is sufficient if a communication is made to a person for the protection of one's own interest in which the other also has an interest. This is clearly brought out by the illustrations to the exception. It cannot be seriously suggested that the communication now in question satisfies this test.

The appellant was therefore properly convicted of the offence and nothing was said about the sentence. The appeal fails and is dismissed.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

The Official Assignee, High Court, Bombay

.. *Appellant**

v.

Haradagiri Basavanna Gowd (since deceased) and after him
his legal representatives and others

.. *Respondents.*

Presidency Towns Insolvency Act (III of 1909), sections 17 and 51 and Provincial Insolvency Act (V of 1920), sections 28 (2), 28 (7) and 77—Scope:—Orders of adjudication passed by both the Bombay High Court and the District Court—Relation back and vesting of insolvent's property—Section 77 of Act (V of 1920)—Scope—Courts to be auxiliary to each other.

The Bombay High Court adjudicated the firm as insolvent on April 17, 1950 on a petition presented on April 14, 1950 in respect of an act of insolvency committed on 14th March 1950. The District Court at Bellary passed an order of adjudication on December 13, 1950 on a petition filed on January 25, 1950. On the question on whom the property of the insolvent vest, whether on the Official Assignee, Bombay or on the Official Receiver, Bellary,

Held : The property of the insolvent vests in the Official Assignee by virtue of the operation of section 17 of the Presidency Towns Insolvency Act. Section 17 provides for the vesting of the property on the making of the order of adjudication, and so, when the District Court at Bellary passed an adjudication order in the insolvency proceedings pending before it, section 28 (2), Provincial Insolvency Act could not in law operate in respect of the insolvent's property because the said property had by virtue of the statutory provisions contained in section 17 of the Presidency Act already vested in the Official Assignee. The doctrine of relating back on which section 28 (7) of the Provincial Act and section 51 of the Presidency Act are based, could have no application in the present case because the vesting in the Official Assignee is the result of a statutory provision ; and so, in the absence of any provision in the Provincial Act for the divesting of the property which has already vested in the Official Assignee, it cannot be said that the doctrine of relating back has that effect.

The reasonable way to reconcile section 28 (2) read with section 28 (7) of the Provincial Act with sections 17 and 51 of the Presidency Act is to hold that the doctrine of relation back prescribed by section 28 (7) has no application to cases where the insolvent's property has already vested in the Official Assignee.

Section 77 of the Provincial Act lays down the procedure whereby one Court can make a request to another Court, and in that behalf it provides that considerations of decorum and courtesy require that the request should be made by the Court itself and not by its officers. Therefore, if the Bombay High Court had to make a request to the Court at Bellary under section 77, it would have been necessary for the said High Court to make an order in that behalf and follow it up by a letter of request addressed to the District Court at Bellary.

The order passed by the District Court at Bellary on December 13, 1950, calling upon the Official Receiver to move the Bombay High Court for annulment of its adjudication order had not been complied with by the said Receiver, and so, the principal object of the Official Assignee in making the subsequent application was to invite the attention of the Court to the failure of its officer to comply with the order already passed and to request the Court to transfer the assets and books of account

of the firm to Bombay. The Official Assignee, in substance, requested that since the earlier order of the Court had not been complied with, the last operative portion of the order should be enforced and transfer made as requested by him. Meanwhile the Official Receiver moved the Bombay High Court without success, and before the District Court finally dealt with the Official Assignee's application, the aid earlier order became fully operative. Therefore, the order passed by the District Court directing the transfer of the assets and account books of the firm to Bombay, was, in a sense, a corollary to the earlier order passed by it on December 13, 1950. That being the nature of the proceedings taken by the Official Assignee before the District Court, it is inappropriate to hold that section 77 of the Provincial Act came into play and it had not been complied with.

When the Official Assignee moved the District Court by his second application, he was really claiming that the assets of the insolvent should be transferred to him because they had vested in him already, and he wanted that the claim made by the respondents has to be tried between him and them and that can be done by the Bombay High Court which had passed an adjudication order under section 17 of the Presidency Act.

If the respondents desire that their claim to the said amount should be tried by the Bellary Court on grounds of convenience, it is open to them to make an application to the Bombay High Court in that behalf.

Appeal by Special Leave from the Judgment and Decree dated the 21st October, 1955 of the Andhra High Court at Guntur in Appeal against Order No. 94 of 1952.†

I. N. Shroff, Advocate, for Appellant.

P. Ram Reddy, Advocate, for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal by Special Leave arises out of insolvency proceedings taken against the firm of T. A. Doshi, Bombay (hereinafter called the firm) by its creditors on the Original Side of the Bombay High Court, as well as in the District Court, Bellary. The orders of adjudication passed against the said firm by the two Courts have led to some avoidable complications and delay, with the result that the claim made by the respondents in respect of a portion of the property of the insolvent before the District Court at Bellary still remains to be tried, though the insolvency orders were passed as early as 1950.

It appears that on 25th January, 1950 an application was presented (I. P. No. 2 of 1950) in the District Court, Bellary, by some of the creditors of the firm for adjudicating the firm as insolvent, and on 13th December, 1950, an order of adjudication was passed. Pending the adjudication proceedings, the District Court appointed the Official Receiver as interim Receiver at the instance of the petitioning creditors. The Receiver was authorised to take possession of certain goods alleged to belong to the insolvent which were then in transit to Bombay. Accordingly, the Receiver took possession of the said goods and under the orders of the Court, disposed of them. The sale-proceeds were then deposited in Court. Thereupon, the respondents moved the District Court and claimed that they were entitled to a part of the money deposited by the Official Receiver, because the Railway Receipt in respect of the goods which had been sold by the Receiver had been made over to them by the insolvent for consideration. On this allegation, they prayed that as an interim measure, the sale proceeds should be paid over to them, because they had borrowed money from a bank on the security of the Railway Receipt in question and since the goods had been taken over by the Receiver, the bank was demanding immediate repayment of the loan. This application was allowed by the Court and the respondents were permitted to withdraw the amount on giving security and an undertaking to re-deposit the amount in Court with interest at 6 per cent. per annum when called upon to do so. In accordance with this order, the respondents withdrew the money on 6th April, 1950. The claim made by the respondents in this way still remains to be tried though they withdrew the amount as far back as 6th April, 1950.

Whilst the insolvency proceedings before the District Court had proceeded in this manner, similar proceedings had already been taken against the firm by some other creditors on the Original Side of the Bombay High Court on 14th April, 1950 (I. P. No. 52 of 1950). On this application, an adjudication order was passed on 17th April, 1950. As a result of this order of adjudication all the properties of the insolvent vested in the Official Assignee of Bombay. The Official Assignee

then moved the District Court at Bellary (I.A. No. 183 of 1950), and prayed that insolvency proceedings pending against the firm in that Court should be stayed and that all the assets and books of account belonging to the insolvent should be transferred to Bombay. To this application, the respondents were made parties.

On 13th December, 1950, whilst making an order of adjudication, the District Court passed an order on the application made before it by the Official Assignee of Bombay. It directed its Official Receiver to move the Bombay High Court to annul the adjudication order made by it on 17th April, 1950. It observed that when such an application is made before the Bombay High Court, the said Court will consider all the relevant facts and circumstances and decide whether it would be convenient for all concerned to allow the assets and effects of the insolvent to be administered at Bellary or at Bombay. Having made this order, the District Court instructed the Official Receiver not to part with any portion of the assets and effects of the insolvent until he moved the Bombay High Court and final orders were passed on his application. It, however, added that if the High Court decides that the assets and effects of the insolvent should be administered from Bombay, all the assets, documents and account books belonging to the insolvent will be handed over to the Official Assignee at Bombay. Pending the final decision of the application to be made by the Official Receiver, *status quo* was allowed to be maintained. This order was not challenged by the respondents by preferring an appeal against it.

Though the District Court had directed the Official Receiver to move the Bombay High Court, no action was taken by him for a long time; and so, the Official Assignee had to file another application before the District Court (I.A. No. 171 of 1951) on 15th October, 1951. By this application, the Official Assignee brought it to the notice of the Court that the Official Receiver had taken no action in accordance with the orders already passed by the Court and so, it was necessary in the interests of justice that the Court should direct the respondents to deposit all the amounts drawn by them on furnishing security and to transfer the said sums and other sums in deposit in Court and all the assets, movables and the books of account of the insolvent's firm together with the file of the Insolvency Case I.P. No. 52 of 1950 to the Bombay High Court. It was alleged that unless these steps were taken, the estate would suffer irreparable loss and injury.

Meanwhile, the Official Receiver moved the Bombay High Court for annulment of the adjudication order already passed by it. The High Court declined to annul its adjudication orders and directed the continuance of the insolvency proceedings before it because it took the view that the estate of the insolvent could be administered more conveniently in Bombay than in Bellary.

When the application made by the Official Assignee (No. 171 of 1951) came to be heard by the District Court, it was duly apprised of the order passed by the Bombay High Court on the application made by the Official Receiver. Having regard to the fact that the Bombay High Court had declined to annul its adjudication order, the District Court took the view that the application made by the Official Assignee should be allowed. It, therefore, directed the Official Receiver to transmit all the accounts and deposits lying in Court and called upon the respondents to refund the amounts drawn by them on furnishing security with interest at 6 per cent per annum, so that the same could as well be transferred to Bombay.

This order was challenged by the respondents by preferring an appeal before the High Court of Andhra Pradesh. The High Court has allowed the appeal.¹ It has held that the application made by the Official Assignee did not satisfy the requirements of section 77 of the Provincial Insolvency Act and that, on the whole, it would be more convenient that the estate of the insolvent should be administered by the District Court at Kurnool which had been clothed with jurisdiction to try the said proceedings as a result of the reorganisation of the States. It is against this decision of the High Court that the Official Assignee (hereinafter called the appellant) has come to this Court.

The first question which calls for our decision in this appeal is : in whom does the property of the insolvent vest? For deciding this question the relevant provisions of the Provincial Insolvency Act and the Presidency Towns Insolvency Act have to be considered. Section 17 of the Presidency Act provides, *inter alia*, that on the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors. Under section 51 of the said Act it is provided, *inter alia*, that the insolvency of a debtor shall be deemed to have relation back to, and to commence at, (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. It is thus clear that when an adjudication order is made under section 17, it relates back to the date specified by section 51. As a result of the combined operation of the said two sections, the insolvency under the Presidency Act commences on the commission of the act of insolvency and it is on that date that the property of the insolvent vests in the Official Assignee. Section 51 clearly shows that the insolvency is deemed to commence from the moment when the debtor committed the earliest act of insolvency which is proved to have been committed within three months before the presentation of the petition on which the order of adjudication is made. This petition can be made either by the debtor himself or by any of his creditors. This position about the effect of the doctrine of 'Relation back' is not in dispute. Applying this principle, it would follow that the adjudication order passed by the Bombay High Court on 17th April, 1950, on the insolvency petition filed before it goes back not only to the date on which the said petition was presented, *viz.*, 14th April, 1950, but to the earliest act of insolvency within three months prior to the said presentation which is 14th March, 1950. In other words, the adjudication order passed by the Bombay High Court relates back to 14th March, 1950.

Let us now examine the effect of the order of adjudication passed by the District Court at Bellary. Section 28 (2) of the Provincial Insolvency Act provides, *inter alia*, that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors. This corresponds to section 17 of the Presidency Act. Section 28 (7) of the Provincial Act which provides for relation back of the adjudication order, lays down that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made. Unlike section 51 of the Presidency Act which relates back the adjudication order to the earliest act of insolvency within three months before the presentation of the insolvency petition, section 28 (7) of the Provincial Act relates back the adjudication order to the date when the petition was presented; and that means that the order of adjudication passed by the District Court on 13th December, 1950, will relate back to 25th January, 1950 when the petition was presented in the said Court. This position also is not in dispute.

The question which then arises is in whom does the insolvent's estate vest? Does it vest in the Official Assignee by reason of the fact that the order of adjudication was made by the Bombay High Court before the District Court made a similar order, or does it vest in the Official Receiver of the District Court because the adjudication order passed by the District Court relates back to a date earlier than the date to which the Bombay High Court's adjudication order relates? In our opinion, the property of the insolvent vests in the Official Assignee by virtue of the operation of section 17 of the Presidency Act. Section 17 provides for the vesting of the property on the making of the order of adjudication, and so, when the District Court at Bellary passed an adjudication order in the insolvency proceedings pending before it, section 28 (2) could not in law operate in respect of the insolvent's property because the said property had by virtue of the statutory provisions contained in section 17 of the Presidency Act already vested in the Official Assignee. The doctrine of relating back on which section 28 (7) of the Provincial Act and section 51 of the

Presidency Act are based, could have no application in the present case because the vesting in the Official Assignee is the result of a statutory provision; and so, in the absence of any provision in the Provincial Act for the divesting of the property which has already vested in the Official Assignee, it cannot be said that the doctrine of relating back has that effect. The object of providing for the vesting of the insolvent's property in the Court Officer obviously is to protect the said property in the interests of the creditors of the insolvent and to facilitate its fair and just administration. If for achieving that object by operation of an adjudication order passed by the Bombay High Court in exercise of its jurisdiction under section 17 the said property has vested in the Official Assignee, there would be no purpose in providing that the said property should be divested from the Official Assignee and vested in the Official Receiver of the District Court.

In a case where adjudication orders are made by two different Courts, the procedure to be followed may depend upon considerations of convenience, fair play and justice; but there is no justification for the argument that because section 28 (7) takes the adjudication order of the District Court to an earlier date, the property which has vested in the Official Assignee should be divested and should be deemed to be vested in the Official Receiver. The reasonable way to reconcile section 28 (2) read with section 28 (7) of the Provincial Act with sections 17 and 51 of the Presidency Act is to hold that the doctrine of relation back prescribed by section 28 (7) has no application to cases where the insolvents' property has already vested in the Official Assignee. Therefore, we must hold that the property of the firm has validly vested in the Official Assignee.

A similar question fell to be considered by the Madras High Court in *The Official Assignee of Madras and another v. The Official Assignee of Rangoon by his Agent Subramania Aiyar and another*¹. Wallis, C.J., who delivered the judgment of the Court held that where there are successive adjudications in insolvency by two Courts, all the property of the insolvent vests in the Official Assignee appointed by the Court in which the prior adjudication was made and it will not be divested from him by the subsequent adjudication of the other Court, even if the later adjudication be based on acts of insolvency committed earlier in date than those upon which the prior adjudication was made. It is true that in that case both the competing orders of adjudication had been passed by the High Courts in proceedings which were governed by the provisions of the Presidency Act. But the principle which was enunciated by Wallis, C.J., in dealing with that case, would apply as much to the present case where the competing adjudication orders have been passed under the provision of the Presidency and the Provincial Acts respectively. "The provision in section 17", observed Wallis, C.J., "that on the making of an order of adjudication the property shall vest in the Official Assignee is express, and there is no provision in the Act divesting the property so vested in that Official Assignee and transferring it to another Official Assignee under a later adjudication" (p. 125). Section 51 like section 28 (7) is really intended to enable the Official Assignee or the Official Receiver to recover property from third parties and it is with that object that the said provisions prescribe the doctrine of relation back. The said doctrine is not intended to divest the property which has already vested in the Official Assignee by virtue of an order of adjudication and vesting it in another Official Assignee or Official Receiver. As Dicey² has observed, the property to be vested in the Court Officer under the Insolvency Law "must be in strictness property of the bankrupt. Property which once belonged to the bankrupt, if it has before the commencement of the bankruptcy become already vested in some other person, e.g., the trustee under a Scottish bankruptcy, is not the property of the bankrupt, and does not vest in the trustee under the English bankruptcy." Therefore, in dealing with the present dispute, we must proceed on the basis that the property of the firm has vested in the Official Assignee at Bombay and the Bombay High Court is entitled to deal with all matters arising in respect of the insolvency of the firm.

The High Court of Andhra Pradesh has held that the application made by the Official Assignee does not meet the requirements of section 77 of the Provincial Act; and so, it has set aside the order passed by the District Court directing the transfer of the assets and account books to Bombay. Section 77 of the said Act lays down that Courts should be auxiliary to each other, and it provides that all Courts having jurisdiction in insolvency and the officers of such Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency; and it adds that an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions. Substantially, the same provision is contained in section 126 of the Presidency Act. According to the High Court, an application made by the Official Assignee cannot be said to be a request made by the Bombay High Court to the District Court at Bellary, and unless a request is made as required by section 77 of the Provincial Act, the Bellary Court should not have acted upon the application made by the Official Assignee. In our opinion, this view is substantially correct in so far as the construction of section 77 is concerned. Section 77 lays down the procedure whereby one Court can make a request to another Court, and in that behalf it provides that considerations of decorum and courtesy require that the request should be made by the Court itself and not by its officers. Therefore, if the Bombay High Court had to make a request to the Court at Bellary under section 77, it would have been necessary for the said High Court to make an order in that behalf and follow it up by a letter of request addressed to the District Court at Bellary, vide *In re L. King & Co.*¹.

The difficulty in accepting the conclusion of the High Court that the District Court at Bellary should not have allowed the Official Assignee's application however arises from the fact that the said application does not purport to have been made and is, in fact, and, in law, not made under section 77. It will be recalled that the order passed by the District Court at Bellary on 13th December, 1950 calling upon the Official Receiver to move the Bombay High Court for annulment of its adjudication order had not been complied with by the said Receiver, and so, the principal object of the Official Assignee in making the subsequent application was to invite the attention of the Court to the failure of its officer to comply with the order already passed and to request the Court to transfer the assets and books of account of the firm to Bombay. The Official Assignee, in substance, contended that since the earlier order of the Court had not been complied with, the last operative portion of the order should be enforced and transfer made as requested by him. We have already noticed that meanwhile the Official Receiver moved the Bombay High Court without success, and before the District Court finally dealt with the Official Assignee's application, the said earlier order became fully operative. Therefore, the order passed by the District Court directing the transfer of the assets and account books of the firm to Bombay, was, in a sense, a corollary to the earlier order passed by it on 13th December, 1950. That being the nature of the proceedings taken by the Official Assignee before the District Court, it is inappropriate to hold that section 77 of the Provincial Act came into play and it had not been complied with.

Dealing with this aspect of the matter, the High Court was inclined to take the view that the earlier order was not a final order and did not amount to *res judicata* between the parties. In our opinion, this view is erroneous. The said order was passed in proceedings to which the respondents were parties, and so far as the District Court was concerned, it dealt with the whole of the dispute then pending between the Official Assignee and the respondents. In terms, the order had provided that if the Bombay High Court decided that the assets and effects of the insolvent should be administered from Bombay, the said assets and account books should be handed over to the Official Assignee at Bombay, and so, there can be no doubt that the said order was complete and final. In view of the subsequent events,

the said order became effective and the Official Assignee was entitled to request the District Court to act upon it and send the assets and account books and documents to Bombay. We must accordingly hold that the High Court was in error in reversing the order of the District Court and directing instead that the insolvency proceedings in so far as they related to the dispute between the Official Assignee and the respondents should be tried at Kurnool. It would be noticed that when the Official Assignee moved the District Court by his second application, he was really claiming that the assets of the insolvent should be transferred to him because they had vested in him already, and he wanted that the claim made by the respondents has to be tried between him and them and that can be done by the Bombay High Court which had passed an adjudication order under section 17 of the Presidency Act. This aspect of the matter does not appear to have been properly placed before the High Court.

Mr. Ram Reddy, for the respondents, however, contends that though the Bombay High Court may be the principal Court entitled to deal with the insolvency proceedings against the firm, the subsidiary question raised by the respondents can nevertheless be tried by the District Court at Bellary. This argument is based mainly on grounds of convenience of parties. We do not propose to express any opinion on this point in the present appeal. We are satisfied that the assets which have been ordered by the District Court to be transferred to Bombay include the amounts allowed to be withdrawn by the respondents on conditions imposed by the District Court in that behalf. If the respondents desire that their claim to the said amount should be tried by the Bellary Court on grounds of convenience, it is open to them to make an application to the Bombay High Court in that behalf. The entire insolvency proceedings against the firm must be tried by the Bombay High Court. It would, however, be open to the Bombay High Court to allow the dispute between the respondents and the Official Assignee to be tried by the Bellary Court if it came to the conclusion that it would be convenient, fair and just to adopt such a course. Therefore, we will not direct the respondents to re-deposit the amount in the Bellary Court with interest accrued due because we propose to allow the respondents liberty to make an application in that behalf to the Bombay High Court within two months from to-day. If the Bombay High Court accepts their plea and orders that the dispute between the respondents and the Official Assignee should be tried at Bellary, the said High Court may also decide whether the amount already withdrawn by the respondents should be re-deposited before the said dispute is disposed of, or only after it is decided against them. That is a matter which would be in the discretion of the Bombay High Court. If, however, the respondents do not make an application to the Bombay High Court within two months, they will have to re-deposit the entire amount in Bellary Court and the said Court will thereupon transfer the said amount to the Bombay High Court to be dealt with in accordance with the provisions of the Insolvency Law. We ought to add that Mr. Ram Reddy has conceded, and we think, rightly, that if the Bombay High Court allows the matter in dispute between the respondents and the Official Assignee to be tried in the District Court, it should be so tried not in the District Court of Kurnool but in the District Court of Bellary.

In the result, the appeal is allowed, the order passed by the High Court is set aside and that of the District Court restored with the modification in respect of the amount withdrawn by the respondents, as indicated above. The appellant will be entitled to his costs from the respondents throughout.

V.S.

Appeal allowed.

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